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 Filed November 1, 1952, Harry M. Hull, Clerk

EXHIBIT A

OPINION OF THE LOYALTY REVIEW BOARD:

December 12, 1951

CHAIRMAN, LOYALTY REVIEW BOARD:

CASE OF: John Stewart Service, Foreign Relations Officer, U. S. Department of State, Washington, D. C.

The undersigned panel of the Loyalty Review Board first took up this case on post-audit, and on March 3, 1950, recommended that it be remanded to the Loyalty Security Board of the State Department for a hearing on charges. Subsequently a hearing was held, and the State Department board reaffirmed its decision favorable to the employee. Pending consideration of this decision on post-audit, supplementary information was received from the F.B.I. and the file was returned to the State Department board for such consideration as it deemed advisable. And after the amendment to Executive Order 9835 by Executive Order 10241 the case was again referred to the State Department board, which in each instance reaffirmed its favorable action. The case then came once more before this panel on post-audit, and after review of the entire file it was recommended under date of October 9, 1951, that a hearing be held pursuant to Loyalty Review Board Regulation 14.

A hearing was accordingly held by the undersigned panel at the office of the Loyalty Review Board, Washington, D. C., on November 8, 1951, at which the em-

ployee was present and testified and was represented by his counsel, Charles Edward Rhetts of Washington.

86 We are satisfied that during the employee's service in China, including his visits to Yenan while assigned to the Army and acting under Army orders, the reports which he made from Yenan raise no reasonable doubt concerning his loyalty. In this respect we reaffirm the opinion expressed in our memorandum of March 3, 1950, in which we said:

> "It is evident that as a result of his official visit to the Communist headquarters at Yenan and from other sources, Mr. Service believed that the Communists were putting up a more effective fight against the Japanese than the Nationalists, and that the Communists should be helped. This view was shared by other observers, and it appears to have been Service's honest opinion. That he held and reported such opinion is, in the judgment of this panel, no reflection upon his loyalty. Furthermore, it was a part of his duty to confer with the Communists and report upon what he found and his conclusions as to what should be done. It should also be noted that there are many reports from those familiar with Mr. Service's work which are highly commendatory."

Concerning the employee's conduct in other respects while on assignment in China, we have in the file no sufficient evidence to support a doubt on the question of loyalty. There is, however, testimony of Patrick J. Hurley before the Armed Services Committee of the United States Senate at hearings held in June 1951, indicating that the employee may have given a Chinese Communist official a copy of his report of October 10, 1944, to General Stilwell, entitled "The Need for Greater Realism in our Relations with Chiang Kai-shek." This is the report known as Service's Report No. 40. This testimony was not available to us at the time of our hearing, and the employee was not examined upon it. We therefore make no finding with respect

to this question but make note of it as a subject worthy of inquiry should there be further proceedings in
87 this case.

A review of the entire file, including the testimony at the hearing before the State Department board, also satisfies us that no reasonable doubt concerning the employee's loyalty arises from his activities while assigned to the staff of General MacArthur in Tokyo.

There is no evidence in the file that the employee was ever a member of the Communist Party or of any other organization on the Attorney General's list.

There remains for consideration the employee's dealings with Philip C. Jaffe of New York, the editor of Amerasia, and with others after his return from China on April 12, 1945, and up to the time of his arrest in connection with the Amerasia case on June 6, 1945. In this connection reference is made to the following provision of Executive Order 9835:

"Part V—Standards

"2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following. . . .

"d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States."

There is no evidence that the employee stole or abstracted from the official files and transmitted to Jaffe or any other person any official files. Such files found in Jaffe's possession appear to have come from Emmanuel S. Larsen, Andrew Roth, or some other source. It was on this charge that the Grand Jury in the so-called Amerasia

case found no bill against Service. It is not disputed, however, that Service did intentionally lend for a period of time to Jaffe from 8 to 19 copies which he had
88 retained in his files of his reports made during his official visits to the Communist headquarters in Yenan during 1944 and 1945, and that he orally gave Jaffe considerable information concerning what he had learned while on Government service in China and that these reports and some of this information was of a confidential or non-public character. The practice of giving out information appears to have been somewhat loose, but it is clear there was, at least to some extent, a breach of State Department regulations. The only question remaining is whether these disclosures were of such a character or were made under such circumstances as to lead to the conclusion that there is reasonable doubt concerning the employee's loyalty to the Government of the United States. We shall now address ourselves to that question.

The employee left Yenan on April 8 and arrived in Washington from China on April 12, 1945, bringing with him his file copies of his Yenan reports for 1944 and 1945 and also originals for the State Department of some of his 1945 reports. The others had been distributed by him through channels while in China. These State Department copies he says he delivered at the State Department shortly after his arrival, and there is no evidence to controvert this. He appears to have spent the first week after his arrival in Washington reporting to various officials in line of his duty.

On April 19, a week after his arrival from China, Service received a telephone call from Lieutenant Andrew Roth of the Navy Department, whom he had met in 1944 at a meeting of the Institute of Pacific Relations, inviting him to dinner. Later, Roth called and said that he had also invited Philip Jaffe, who was staying at the Statler in Washington, and suggested that Service call and pick Jaffe

up. Service accordingly called up Jaffe and arranged to meet him at Jaffe's room in the hotel. Service testified that he had never before met Jaffe, but knew of
89 him as editor of Amerasia, and, believing that he would be interested, brought with him to Jaffe's room his file copy of a report of an interview he had had in Yenan in the spring of 1945 with Mao Tse-tung, the Communist leader. There is information in the file indicating that Service had met Jaffe in China some years previously, and had transmitted information to Jaffe from China. We find no corroboration of this. And it appears from F.B.I. reports that Service and Jaffe in their telephone conversion arranged to meet in Jaffe's room because if they were to meet in the lobby they might not recognize each other.

Service allowed Jaffe to retain the copy of the Mao interview, and Jaffe expressed an interest in Service's other reports and it was arranged that they would meet again in Jaffe's room at the Statler on the morning of the 20th. Pursuant to this appointment Service the next morning brought a number of his reports (which in his testimony before the State Department board he claimed were specially selected as being of such nature that they might be divulged) and left them with Jaffe. Service then returned for lunch with Jaffe and Lieutenant Roth in Jaffe's room at the hotel, and Jaffe said that he wanted more time to read the reports and would like to take them to New York, to which Service assented. Service testified that he lent Jaffe 8 or 10 of his reports. The information in the file indicates that Jaffe may have received from Service as many as 19.

On April 25 Service called on Jaffe at the Amerasia office in New York, and picked up the reports. As he kept no record of what reports he had lent to Jaffe and made no check of those which were returned, we have no accurate information as to how many and what reports

Service in fact lent to Jaffe. While in New York on the 24th and 25th of April, Service stayed at the apartment of Mark Gayn, a free lance writer on Far
90 Eastern subjects whom he had met for the first time on April 18th and who had been a college mate of his brother, and on the evening of the 24th he attended a party at Gayn's apartment at which Mr. and Mrs. Jaffe, Kate Mitchell, and others were present. Service met Jaffe again in Washington at Jaffe's room in the Statler on May 8, and on May 29 picked up Jaffe at the Statler and attended with him and others a farewell party for Lieutenant Roth. He also met Jaffe in New York on a week-end party of Mr. and Mrs. T. A. Bisson on May 19 and 20. There is no evidence that Service passed any copies of reports to Jaffe at any meetings subsequent to those of April 19 and 20, but there is information in the file indicating that on May 8 and 29 at Jaffe's room in the Statler Service continued to talk freely with Jaffe, as he had on the 19th and 20th of April, and this notwithstanding the fact that at these first meetings Service felt that Jaffe was unpleasantly inquisitive and insistent, and that after leaving the meeting of April 20 with Lieutenant Roth Service asked Roth if Jaffe was a Communist, to which Roth replied that he did not think he was a Communist, but that he was extremely sympathetic. It was also notwithstanding the fact that on April 25th in New York one Harold Isaacs, known to Service to be a former Communist, in response to an inquiry made by Service told Service that Jaffe was "bad business" or "bad medicine", and that while on the week-end party with the Bissons on May 19th and 20th Jaffe in conversation with Service took what appeared to Service to be the "party line" by telling Service that "they had real freedom of the press in Russia, that they did not have real freedom of the press here."

Service concedes that he should not have lent copies

of his reports to Jaffe, but in extenuation he says that so far as he then knew Jaffe was a reputable journalist, and that giving what he called "background" information
91 to reputable journalists had been encouraged by his superiors. The testimony of others indicates, however, that background briefing seldom went to the extent of showing reports, much less lending them or giving them out. And Brooks Atkinson, in a letter submitted to the State Department board on behalf of Service, says, "My only complaint as a reporter was that Mr. Service was too punctilious about State Department security and declined to tell me everything he knew. He never permitted me to see classified material and was cautious and guarded about matters he considered confidential." This contrasts strangely with the very different treatment accorded by Service to Jaffe. Indeed, Service frankly stated that he placed no restriction on the use which Jaffe might make of the reports which he lent to him.

Service conceded that in no event should reports which had passed through headquarters and to which were attached letters of transmittal or comments be handed out. A number of such reports were found among Jaffe's papers, but the evidence indicates that none of them came from Service.

Copies of reports which Service did lend or may have lent Jaffe were also found among Jaffe's papers. It appears that one Anne H. C. Blumenthal copied a number of reports for Jaffe, and it seems probable that some or all of those lent by Service to Jaffe were among these.

We have examined the 18 reports copies of which Service concedes were or may have been lent by him to Jaffe. Some of these are not classified; others are classified "secret" or "confidential." Service testified, and the evidence indicates, that these were his own classifications and that, in many cases at least, before he showed them to

Jaffe by reason of lapse of time or otherwise they were no longer secret or confidential.

92 From our examination of these reports, it appears to us that they were for the most part such as a newspaper reporter on the spot might transmit to his newspaper. Some of them, however, appear to us to be of a nature which no discreet person would disseminate without express authority, and some of them were dated within four to six weeks of the time they were lent to Jaffe, and the originals had not been in the hands of the State Department for more than a week. These recent reports therefore might be considered as "hot news."

We have no knowledge of what information Service may have imparted to Jaffe and others orally during these meetings in New York, or during the evening parties he went to with Jaffe and others in Washington on April 19 and May 29. We do, however, have some information concerning Service's conversations with Jaffe in Jaffe's room at the Statler in Washington on April 19th and 20th and May 8th and 29th. These indicate that there was some conviviality, and that Service talked very freely, discussing, among other things, troop dispositions and military plans which he said he had seen and which he said were "very secret." This intimacy of talk appears to have continued unabated, though from the first Service felt that Jaffe was unduly inquisitive and evidently suspected that Jaffe might be a Communist, having after the meeting of April 20th asked Lieutenant Roth whether Jaffe was a Communist, to which Roth replied that he did not believe Jaffe was a Communist but that he was extremely sympathetic. It also continued after Isaacs had told Service on April 25th that Jaffe was "bad business" or "bad medicine," and after Jaffe had on May 19th or 20th taken the "party line" in conversation with Service. At no time did Service consult his superiors as to the extent to which he might properly give Jaffe information.

93 What have we that gives ground for reasonable doubt as to Service's loyalty? With some necessary repetition of what has preceded, the grounds, as we see them, are these:

He knew very early in his association with Jaffe that Jaffe was a very doubtful character, extremely left-wing, as Service said in his testimony before us. He was asked before us, "What made you think he might be a Communist?" The answer was, "I don't remember anything specific. It was fairly obvious from talking to him, and his general approach, that he was extremely left-wing. He was a much more uncritical booster of the Chinese Communists than I was. At some point fairly early, he mentioned his interest and participation in something like Russian Relief."

His counsel urged in his excellent brief that Service had mentioned Jaffe to several of his friends and colleagues, and that none of the persons of whom these inquiries were made—Vincent, Friedman, Isaacs, or Salisbury—gave any indication that Jaffe was a Communist or an improper person to associate with. His statement is not entirely accurate, but it scarcely helps Service.

Service was a highly trusted official of his Department, of long and wide experience in his particular field. The statements made by him, quoted above, show that no such warning was necessary. He knew almost from the start of his relations with Jaffe of Jaffe's true character. To this man he gave, as we have stated, a large number of his reports. His story is that there were eight or ten of them which he gave to Jaffe. Jaffe, as reported by the F.B.I., said Service gave him 19. Giving these reports was against the State Department's regulations, as Service knew. It is true that, as we have said, these regulations were apparently not always strictly observed, and how many of these reports Service really furnished Jaffe is a matter of considerable doubt.

94 Step by step, as Service continued in his association with Jaffe, Service had a continuing line of warnings as to Jaffe's character. We begin on April 20, after Service had delivered his reports to Jaffe. He asked Roth if Jaffe were a Communist, and Roth said he was not a Communist, but a left-winger and very sympathetic. Later, when Service came to New York on April 24 and 25, two things which should have been a warning occurred.

He said he was very much annoyed at finding that Jaffe had turned over Service's reports to Gayn for use. It had been previously noted that Service had put no restrictions on the use to which Jaffe might put these reports. He had, he says, simply assumed that Jaffe would treat them as reporters might use them for background information.

In New York, he saw his friend, Isaacs, who said Jaffe was "bad medicine." Isaacs had been a Communist himself, and "bad medicine," used by an ex-Communist, should, we think, have had some special significance to Service. Later, at Bisson's party on May 19, Jaffe, as quoted above, takes what Service himself called "the Communist line" in saying that there was more freedom of the press in Russia than in this country.

Service also says that he soon disliked Jaffe as a person—that he was aggressive and nosey. Yet, notwithstanding what Service knew about Jaffe as a communist sympathizer, and notwithstanding this stated dislike of him as a person, we find in the conversations between Jaffe and Service at the former's hotel room in the Statler, as reported by the F.B.I., no indication of any caution by Service in the continuous line of answers he made to Jaffe's "nosey" inquiries on State Department matters. If Jaffe was nosey, he rarely failed to get from Service what he asked for, punctuated at one time, at least, by the statement, "This is very secret." Service undertook to

get documents for Jaffe in the Department. Quite irrespective of whether these documents could properly be made available to Jaffe, the question we ask ourselves is, "Why should Service do it for a man he says he disliked and whom he knew to be very much of a left-winger and, as Service's own statements indicate, whom he suspected of being a Communist?" The evidence of Jaffe's true character was, we think built up with every contact Service had with him, and yet his last long conversation with Jaffe on May 29 shows Service telling Jaffe matters which we think a reasonably decent person in Service's position of trust should have hesitated to disclose even to a friend in whose character he had complete faith. The contrast between his treatment of Jaffe and his treatment of Brooks Atkinson, an accredited representative of the New York Times, as reported by the latter and previously quoted herein, requires no comment.

To say that his course of conduct does not raise a reasonable doubt as to Service's own loyalty would, we are forced to think, stretch the mantle of charity much too far.

We are not required to find Service guilty of disloyalty, and we do not do so, but for an experienced and trusted representative of our State Department to so far forget his duty to his trust as his conduct with Jaffe so clearly indicates, forces us with great regret to conclude that there is reasonable doubt as to his loyalty. The favorable finding of the Loyalty Security Board of the Department of State is accordingly reversed.

* * * *

96 Filed November 1, 1952

EXHIBIT B

OPINION OF THE LOYALTY SECURITY BOARD OF THE DEPARTMENT OF STATE

October 6, 1950

The case of John Stewart Service, on which the Loyalty Security Board of the Department of State had reported a favorable determination based on the information then available, was remanded on March 14, 1950, by the Loyalty Review Board, with the statement that the reviewing panel had concluded that the record had not been fully developed, and that a hearing should be held on charges. In accordance with this recommendation charges were preferred against Mr. Service and a hearing has been held. The hearing before the Loyalty Security Board has consumed fifteen days and has resulted in the accumulation of a voluminous transcript and numerous exhibits. Although the Regulations prescribed by the Loyalty Review Board provide that the determinations of the Loyalty Security Board "shall state merely the action taken", it is the feeling of the Loyalty Security Board that a full statement should be made of the reasons for its conclusions in this case, in view of the wide interest in the "Amerasia" case, in connection with which Mr. Service was arrested in 1945.

John S. Service was born in Chengtu, China, August 3, 1909, of American missionary parents. He was educated at Shankhai American School, Berkeley High School (Berkeley, California) and Oberlin College, A.B. 1931. At Oberlin he was captain of two athletic teams and president of the Men's Honor Court. In 1933 he returned to China and became clerk in the American Consulate at Kunming in the Province of Yunnan. In 1935 he was admitted to the

Foreign Service and was assigned as a language student at the Embassy in Peiping; in 1938 he was transferred to the Consulate at Shanghai; in 1941 he was assigned
97 as Third Secretary of the Embassy at Chunking.

After a four-months' leave in the United States in 1942-43, he was sent to Lanchow, in May 1943, as an observer for the Embassy. In August 1943, at the request of Secretary of War Stimson, he was detached from the Embassy and assigned to General Stilwell, Commander of the American forces in the China-Burma-India Theater. During this service he was sent with an Army observer group to the Communist headquarters in Yenan. He was in Yenan from July to October of that year, and was then returned to the United States, at the time of General Stilwell's recall. After a brief period of consultation in Washington he went on leave. In January 1945, he was again ordered to Chunking, for detail to the staff of General Wedemeyer, who succeeded General Stilwell. On March 9 he was again sent to Yenan under Army orders to report on an expected Communist Party Congress, but on March 30 was suddenly ordered to return to the United States, where he arrived on April 12. He was arrested on June 6, in connection with the so-called "Amerasia" affair, but on August 10 the Grand Jury returned "no true bill" against him. In September, 1945, he was assigned to the staff of the United States Political Adviser in Tokyo, where he served until he was hospitalized, from April to August, 1946. After a leave in the United States he served as First Secretary and Consul at Wellington, New Zealand, from October 1946 to January 1949; for about two months in 1949 he served on the Foreign Service Selection Board in Washington; and for about a year as Special Assistant to the Chief, Foreign Service Personnel. He was en route to an assignment as Consul General at Calcutta when recalled for the present hearing.

Charges Based on Reports from China

The Board considered first the charges against Mr. Service which have to do with his conduct in China, in
98 particular from 1943 to 1945, while he was stationed in Chunking, Lanchow and Yenan.

First, it is alleged that Mr. Service was disloyal or insubordinate to General Hurley who was in China from August to November 1944 as personal representative of the President, and served as Ambassador to China from November 1944 until November 1945. In particular it is charged that Mr. Service's second trip to the Communist area in Yenan was in disobedience to Ambassador Hurley's instructions. His sudden recall to the United States in March, 1945, was at the instance of Ambassador Hurley, who was in the United States at the time on consultation. The Board finds that at no time during General Hurley's service in China, either as the President's personal representative or as Ambassador, was Mr. Service attached to the Embassy, or subject to Ambassador Hurley's direction. In August, 1943, Mr. Service had been detailed to General Stilwell, and in July, 1944, sent by General Stilwell with an Army observer mission to the Communist Headquarters in Yenan. He was still in Yenan when General Hurley arrived in Chunking in August, and returned from Yenan to the United States at the time of General Stilwell's recall in October. On Mr. Service's return to China in January, 1945, he was still assigned to the Army, now under General Wedemeyer. As for his second trip to Yenan in March, General Gross, who was in command during General Wedemeyer's absence in Washington with Ambassador Hurley, accepted full responsibility, and stated that the trip had the concurrence of both Army Headquarters and the Embassy. Mr. Service cannot have been guilty of insubordination to Ambassador Hurley, for he was at no time his subordinate; he acted at all times strictly in accord-

ance with the orders of his proper commanding officers, to whom his services were apparently satisfactory.

99 *Second,* it is charged that Mr. Service was disloyal to American policy with respect to China, as that policy was represented by Ambassador Hurley, in that Mr. Service was critical of the Chinese Nationalist Government of Chiang Kai-shek and favorably disposed towards the Chinese Communists; that he favored arming and collaborating with the Communist forces; and that he favored stopping United States assistance to Chiang Kai-shek and extending it to the Communists, and believed that Communist participation in Government was the only hope for a stable democratic and independent Chinese Government.

Third, it is charged that Mr. Service was sympathetic with communism and working in the interest of the Communist Party. Since both the *second* and the *third* charges were based upon the reports and recommendations submitted by Mr. Service from China, and since the two charges are closely related in substance the Board considered them together.

There was nothing covert or furtive or secret, so far as American authorities in China or elsewhere were concerned, about Mr. Service's observations, conclusions and recommendations with regard to Chinese affairs from 1942 to 1945. The Board has had access to 127 reports written by Mr. Service between those dates. Only 4 of these precede his assignment as a political observer; about 10 are from Lanchow, where he was observer for the Embassy; about 50 were made at Chunking after he was detailed to the Army; about 35 were made during his first tour of duty in Yenan, where his function was to secure political intelligence for the Army, and for this purpose to become acquainted with the principal Communist leaders, and to report on the organization, policies, program, propaganda and popular support of the Communist Party; 3 were made in Washington; 11 on his return to Chunking; and 14 on

his second trip to Yenan under General Gross's orders. Mr. Service's reports while he was on detail with the Army were in the form of memoranda, prepared in quadruplicate—the original for Army Headquarters, one copy for his immediate superior, Mr. John P. Davies, one for the Embassy, and one for his own files. Mr. Service's views were, therefore, well known throughout both Army Headquarters and the Embassy in China, and in the War and State Departments in Washington, to which Departments copies were forwarded by the Army Headquarters and Embassy respectively.

It is necessary to assess these reports against the background of 1944-1945 rather than that of 1950. In 1944-1945 the war with Japan was reaching its climax. It was the duty of the United States Military Commander in the China Theater to do all in his power to contribute to the defeat of Japan, and to this end to bring about the maximum possible Chinese military effort. In 1944-1945 we were allies with the Soviet Union in the war in Europe, and were furnishing lend-lease arms to the Russian Communists on a large scale. In 1945 it was Ambassador Hurley's mission in China, not only to prevent the collapse of the Chinese Nationalist Government and to keep the Chinese Nationalist Armies in the field, but also to prevent civil war in China and to unify the Anti-Japanese forces in China, whether Nationalist or Communist. This double-headed objective could only be accomplished by an accommodation between the Chinese Nationalist Government and the Chinese Communists. It was precisely such an accommodation which General Hurley was endeavoring, under instructions, to bring about.

The Board has examined Mr. Service's reports in the light of this background. It finds them objective, and extraordinarily accurate as political forecasts of what was to come. It finds no indications that they misstated any fact or reported anything other than his best judgment

101 candidly stated. The sum and substance of Mr. Service's recommendations was contained in his report No. 40, dated October 10, 1944, which profoundly displeased Ambassador Hurley, and in a report drafted by him and by R. P. Ludden, another American observer, dated February 14, 1945. Copies of both reports which have been declassified are appended to this opinion.[1] The essential difference between Ambassador Hurley on the one hand and Mr. Service, General Stilwell and the staff of the Embassy at Chungking on the other hand, concerned the terms on which the amalgamation of forces was to be effected, the conditions under which lend-lease aid would be extended to the Communist forces; the extent to which United States interests required acceptance of the views of Chiang Kai-shek as to the nature and policies of the Chinese Government, or change in the nature and policies of that Government.

Both Ambassador Hurley and Mr. Service advocated, and it was a major objective of Ambassador Hurley's mission to achieve, unification of all Chinese military forces for the purpose of defeating Japan. Ambassador Hurley considered that his primary duty was to sustain the Nationalist Government and that the Communists should be armed only through the Nationalist Government. Mr. Service and General Stilwell considered the Nationalist Government was not prosecuting the war as vigorously as required. They believed that the Chinese forces could be unified only by utilizing lend-lease aid as a bargaining weapon to force Chiang Kai-shek to form a coalition government, and that some lend-lease aid might, if re-

102 quired, be extended to the Chinese Communist forces

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[1] These reports were not in fact appended in the opinion of the Loyalty Security Board as released to the press by the Department of State on December 13, 1951. The document referred to as report No. 40, however, is printed in the Appendix to the Tydings Hearings, at pages 1987-1990. The Service-Ludden memorandum of February 14, 1945 is printed in the same Appendix at pages 1980-1981.

directly. Mr. Service did not favor stopping lend-lease assistance to Chiang Kai-shek but did favor making its continuance conditional upon agreement by Chiang to broaden the base of the government and undertake substantial economic, political and social reform.

The issue before the Board does not require a decision as to who was right. The issue is rather whether the views expressed by Mr. Service constitute disloyalty to American policy with respect to China. The Board finds no indication that Mr. Service was disloyal in this respect. Rather, the Board finds that he was properly stating to his superiors the conclusions at which he had honestly arrived as a result of his personal observations both in Chungking and in Yenan, and recommending a change in policy which he believed essential in the national interest.

In this connection the Board finds itself in hearty accord with a statement made by Secretary Byrnes to the Foreign Relations Committee concerning the reports of Mr. Service and of the other Foreign Service officers criticized by Ambassador Hurley: "What it amounts to is that within proper channels they expressed to those under whom they served certain views which differed to a greater or less degree from the policies of the Government as then defined. Of course, it is the duty of every officer of the United States to abide by and administer the declared policy of his Government. But conditions change, and often change quickly in the affairs of Governments. Whenever an official honestly believes that changed conditions require it, he should not hesitate to express his views to his superior officers. I should be profoundly unhappy to learn that an officer of the Department of State, within or without the Foreign Service, might feel bound to refrain from submitting through channels an honest report or recom-
103 mendation for fear of offending some one in the Department." As Mr. George F. Kennan, Counselor of the Department, said before this Board: "I would feel

very alarmed for the future of Foreign Service reporting if we ever were to permit the implication to creep in that a policy recommendation contrary to the policy that was actually adopted by the Government was a sign of disloyalty to the Government purposes."

With respect to the *third* allegation that Mr. Service was sympathetic with Communism and working in the interest of the Communist Party, the Board finds no evidence that his reports acquired their character from any ulterior motive or association or from any impulse other than his desire to acquaint his superior officers with the facts as he saw and interpreted them. As early as January, 1943, he reported that civil war in China would bring about a Communist government which would not be democratic in the American sense, and which would be more inclined to friendship with Russia than with the United States. In April, 1944, he recommended that in order to prevent Russian dominance over a part or all of China, the United States Government should show a sympathetic interest in the Communist and liberal groups in China, and use its influence with the Kuomintang to promote Chinese unity on the foundations of progressive reform. In June, 1944, he analyzed the weaknesses of the Kuomintang which he said were precipitating a debacle of which the only parties to benefit would be Japan immediately and Russia eventually. He recommended, not a flat refusal to aid the Kuomintang, but the use of that aid as leverage to induce the Kuomintang to broaden the base of the Government and to undertake political reform. When he got to Yenan he reported that the Japanese there were being faced by a total mobilization based on an economic, political and social revolution, and that unless the Kuomintang went as far as the Com-
104 munists in political and economic reform, the Communists would become the dominant force in China within a few years. The Board finds nowhere in his reports any sympathy for Russian or for world Communism, but

only a clearly expressed fear that the policy of the Chinese Nationalist Government, and of the United States Government as a supporter of Chiang Kai-shek alone, was headed for a major disaster that would throw all of China into the hands of the Soviet Union.

The Board had the benefit of expert testimony from Mr. George F. Kennan, Counselor of the Department and for many years a leading American authority on the Soviet Union and Communist matters. At the request of the Board, Mr. Keenan examined 127 of Mr. Service's reports for the specific purpose of forming an opinion as to whether or not they reflected Communist or pro-Communist tendencies or propaganda themes. After completing his examination, Mr. Keenan testified that Mr. Service's reports indicated no Communist inspiration or guidance, that they were free from the exaggerations and distortions characteristic of Communist propaganda, that in important instances the reports took issue with the Communist Party line, that some of Mr. Service's early reports indicated a certain naivete with respect to the Soviet Union but that this was substantially corrected in his later reports, that Mr. Service appeared to be reporting honestly and conscientiously the views at which he had arrived on the basis of an open-minded examination and analysis of the facts before him. Mr. Kennan concluded that the reports could not have been the work of a man with a closed mind or ideological preconceptions.

The Board finds that, on the basis of his reports from China, Mr. Service was neither a Communist nor pro-Communist.

Fourth, it has been charged that at least one of Mr.
105 Service's reports was circulated among the Chinese Communists, and that the Communists were advised that Ambassador Hurley's efforts to prevent the collapse of the Nationalist Government did not represent United States

policy. The charge was denied by Mr. Service and is entirely out of character with his function. His reports did not purport to state United States policy, but only his personal observations, conclusions, and recommendations. No evidence was presented to support this charge and the Board finds no basis for it.

The "Amerasia" Affair.

In the so-called "Amerasia" affair, Mr. Service was charged with furnishing classified information to one Philip Jaffe. In 1945 Philip Jacob Jaffe of New York City was co-editor with Kate L. Mitchell of a magazine called "Amerasia." Jaffe was born in Russia, came to the United States in 1905 and was naturalized in 1923. He was a member of the editorial board of "China Today", the official publication of the American Friends of the Chinese People, which had been cited as a Communist front by the House Committee on Un-American Activities. He is also reliably reported to have collaborated with other Communist front publications, to have been National Treasurer of the National Council of American Soviet Friendship, Inc., an organization on the Attorney General's list, and to have been in frequent contact with many prominent members of the Communist Party. On March 10, 1945, a month before Mr. Service's arrival in the United States, OSS agents searched the offices of "Amerasia", and there discovered a large number of classified government documents principally of State and Navy Department origin. Upon being advised by the OSS of this discovery the State and Navy Departments jointly requested the FBI to make a full investigation. On June 6, Mr. Jaffe was arrested by
106 the FBI, along with Kate Mitchell, and four others, Emmanuel Sigurd Larsen, Lieutenant Andrew Roth, Mark Gayn and Mr. Service. Mr. Larsen was a State Department employee, Lieutenant Roth was a naval reserve

officer on duty in the Office of Naval Intelligence, and Mark Gayn was a free-lance writer interested in questions concerning the Far East. Subsequently a Grand Jury returned indictments against Jaffe, Larsen and Roth, but found "no true bill" against Mitchell, Gayn and Service. Jaffe pleaded guilty, and was fined $2500. Larsen, who had admitted procuring some of the documents for Jaffe, also pleaded guilty and was fined $500. The case against Roth was nol-prossed.

Among the large number of government documents found in Mr. Jaffe's office were copies of about 40 of Mr. Service's reports, and the primary question before this Board in connection with this aspect of the Service Case is his part in making any of these available to Mr. Jaffe. Eight of these 40 were ozalid copies from State Department files which were found in Mr. Jaffe's brief case and were identified by Mr. Larsen as papers which he procured for Mr. Jaffe. Included in the 40 were also typed or carbon copies of at least 10 Service reports procured from other sources than the State Department. None of these 40 reports were papers from Mr. Service's files.

It will be recalled that Mr. Service customarily kept a carbon copy for his personal files of the reports which he made while detailed to the Army in China. Most of these copies bore the typed classification "Secret" or "Confidential" which Mr. Service himself had placed on the original. Copies of about 70 of these reports were in Mr. Service's possession when he arrived in Washington on April 12, 1945, and were found in his possession at the time of his arrest. As stated above, none of Mr. Service's personal copies were found in Jaffe's possession.

107 Mr. Service made a full statement of his connection with Mr. Jaffe to the FBI, to the Grand Jury, and to the Board. Although he had heard of Mr. Jaffe as editor of "Amerasia" he had never met him or communicated with him prior to his return to Washington on April 12,

1945. On April 19 Mr. Service was introduced to Jaffe by Lieutenant Roth, whom he had met the preceding November at a talk that he (Service) gave to the Institute of Pacific Relations, and who now invited him to dinner. Thinking that Jaffe as editor of a specialist magazine on the Far East would be interested in a conversation he had had with the Communist leader Mao Tse-Tung in Yenan, Service took along with him to his meeting with Jaffe a copy of his report on that subject. Mr. Jaffe was interested and asked if Service had other reports that he could see. He invited Mr. Service to lunch the next day, and Mr. Service brought to that meeting about 8 or 10 copies of reports which he carefully selected from his personal file as being descriptive and not discussing American policy. Mr. Jaffe at lunch stated that he wished to take the papers to New York with him. Mr. Service permitted Mr. Jaffe to do so, and afterwards, on April 25, picked up the reports in New York. This, according to Mr. Service, and so far as the evidence before the Board goes, was the entire extent of Mr. Service's transmission of classified documents to Mr. Jaffe. The exact number of documents loaned to Mr. Jaffe is uncertain. It is established that Mr. Jaffe had other sources from which he obtained copies of Mr. Service's reports. The Board found no evidence to disprove Mr. Service's recollection that the number of reports which he loaned to Mr. Jaffe did not exceed ten.

The transmission of classified documents to a person outside the Government service, whether for examination or loan, was not only highly injudicious on Mr. Service's part, but was a violation of the security regulations and
108 practices of the Department. Since the issues here are (1) loyalty, and (2) security risk, the Board has had to examine into the motives behind his act. In this connection the nature of Mr. Service's function in China, from which he was freshly arrived, becomes of moment.

One of Mr. Service's official duties under General Stilwell had been to serve as public relations officer for Army Headquarters, and as such to work closely with American correspondents and to furnish them "background information" regarding the political situation in China. Understanding of this situation was essential to intelligent and accurate press reporting. "Background information" was understood at Army Headquarters to include, at the discretion of the officer, classified information, which could not itself be published, but which would enable correspondents correctly to interpret and report events as they occurred. On his return to the United States in October 1944, as the first American official to return after a visit to the Communist-held areas in China, Mr. Service was sought after, not only by government agencies whose work related to China, but also by newspaper people and other writers on Far Eastern affairs. He was invited, and with the authorization of his superiors accepted the invitation, to address an "off-the-record" meeting of the Institute of Pacific Relations. For all of these conferences he used as working material the substance of his observations in China, the very matter which was contained in his classified reports. It is apparent to the Board that Mr. Service, without inquiring into Mr. Jaffe's background or credentials, but solely on the basis of Mr. Jaffe's connection with "Amerasia", assumed to treat Mr. Jaffe as a reputable writer, and to give him the same sort of "background information" that he had been accustomed to give to newspaper men in China. It is also apparent that Mr. Service was eager to impart to persons interested in the Far East, his views of the Chinese situation.

109 Mr. Service clearly committed two serious indiscretions with reference to these reports. The first was to communicate any classified information at all to Mr. Jaffe without checking on his reputation. The second,

which was both an indiscretion and a breach of regulations, was to allow Mr. Jaffe to take possession, for however short a time, of classified documents. The Board takes note, however, of the fact that the documents in question contained nothing that could be considered harmful to the national security; they were reports of Mr. Service's personal observations on the aims and situation of the Chinese Communists. The Board cannot find Mr. Service disloyal to the United States on the basis of his loan of these documents to Mr. Jaffe.

The Board had before it certain confidential information from the F.B.I. regarding conversations between Mr. Jaffe and Mr. Service in which Mr. Service referred to certain military plans in China as "very secret", and to certain information about the whereabouts of General Stilwell as "very confidential". It has been charged that Mr. Service in these conversations disclosed classified information to Mr. Jaffe. It appeared on hearing that Mr. Service on his return to the United States in April, 1945, was not in possession, nor advised of the contents of, any classified documents regarding military plans or the whereabouts of General Stilwell. As a matter of fact he was not advised of any secret information at all concerning the military plans of the United States or of General Stilwell. He was aware only of general discussions and speculations regarding the possibility of a landing in China, and of the desirability of cooperating with whatever Chinese forces might be met there. General Stilwell had told him that he was looking for a "fighting job" in the Pacific. He did not know the determination of any of these issues. He could therefore not have been guilty of disclosing secret information as alleged, for he had none. It
110 is to be noted that oral information of the sort mentioned does not, like a document, bear on its face its classification, and that it is a mark of prudence, rather than the opposite, for a government official in the

discussion of military speculations with the press in war time, to refer to the subject matter as secret or confidential, in order that no conclusions may be attributed by the press to government sources. The Board does not find any indiscretions on the part of Mr. Service in this issue.

So far as security risk is concerned, the record contains no evidence that Mr. Service has ever, subsequent to the Jaffe incident, been guilty of any indiscretion. The Board believes that the experience Mr. Service has been through as a result of his indiscretion in 1945 has served to make him far more than normally security conscious.

The several social affairs to which Mr. Service was invited between April 19 and May 29, 1945—lunch with Gayn, dinner with Lt. Roth, lunch with Mr. Jaffe, an evening party at Mr. Gayn's, a party at Kate Mitchell's, and another at a Miss Yardouman's given for Lt. Roth, appear to have been initiated by those persons and to have been innocently accepted by Mr. Service as normal amenities. Mr. Service spent two nights at the apartment in New York of Mark Gayn, the free-lance writer, who shared with Mr. Service a China background and had been a college mate of Mr. Service's brother. The association with Lieutenant Roth, a naval officer in uniform on duty with Naval Intelligence, does not appear subject to criticism; the association with Mark Gayn appears to have been a natural one of mutual interests; the Jaffe and Mitchell invitations were accepted on the assumption that these were reputable literary people interested in China. All of these associations on the part of Mr. Service terminated on June 6, 1945. The Board does not consider them evidence of disloyalty, or to be of present significance as to security risk.

111 Mr. Service's name has also been connected with that of Mr. Owen Lattimore. Mr. Service had known Mr. Lattimore since they were both in Peiping in 1936.

After Mr. Service's return to the United States in 1945 he had several casual contacts with either Mr. or Mrs. Lattimore, and was finally invited to spend the first week-end in June at their home in Baltimore. Without his knowing it in advance, Lieutenant Roth and Rose Yardouman had also been invited, and Mrs. Lattimore suggested they come down together. Mr. Service took no documents with him on that occasion, but did take with him a personal copy of a new edition of the writings of Mao Tze Tung which Mr. Lattimore had asked to see. The Board finds nothing exceptional in this association of Mr. Service with a noted writer on Chinese affairs. Mr. Service was never a pupil or protege of Mr. Lattimore.

Subsequent Career

The third and final aspect of this case has to do with Mr. Service's tour of duty in Tokyo from September 1945 to his hospitalization there in April, 1946. It has been alleged that during that period Mr. Service was in touch with Japanese Communist leaders, and was in sympathy with Communism. It appears that Mr. Service served as administrative and executive officer in Tokyo, had no political functions, and took no part in policy decisions. The political reporting at SCAP Headquarters was done by Mr. John K. Emmerson, one of whose duties was to keep in touch with Japanese political leaders. Nosaka, one of the leaders of the Japanese Communist Party, who had spent most of the war at Yenan with the Chinese Communists, called on Mr. Emmerson at SCAP Headquarters and, having met Mr. Service in Yenan, inquired for him. Mr. Emmerson called in Mr. Service for a brief conversation. Mr. Service saw Nosaka on one or perhaps two other occasions, but at no time had any political conversa-
112 tions with him. No evidence was presented to the effect that he was ever in touch with any other

Japanese Communists. The Board finds no evidence that Mr. Service was sympathetic with Communism.

Conclusion

The Loyalty Security Board has given extended, careful and earnest attention to this case, and concludes, on the basis of all the evidence, that reasonable grounds do not exist for belief that John Stewart Service is disloyal to the Government of the United States. The Board further concludes that, notwithstanding a single serious indiscretion in the handling of classified information, he does not constitute a security risk to the Department of State.

On July 31, 1951 the Loyalty Security Board reconsidered the case of John Stewart Service under the provisions of the loyalty standard as amended by Executive Order 10241 of April 28, 1951 and determined that no reasonable doubt exists as to his loyalty to the United States Government.

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364 Filed November 1, 1952

EXHIBIT C

DEPARTMENT OF STATE
WASHINGTON

March 24, 1950

CONFIDENTIAL

My dear Mr. Service:

Under date of March 21, 1947, the President issued Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program in the Executive Branch of the Government. Under date of March 11, 1949, the Department of State promulgated regulations

and procedures, a copy of which is attached, setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State.

In the course of investigations conducted pursuant to this loyalty and security program certain information has been received by the Department of State which, after initial consideration by the Loyalty Security Board of the Department of State, necessitates the formulation of a charge against you.

The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority.

Mr. John Stewart Service,
Department of State,
Washington, D. C.

A hearing has been scheduled under Section 395 of the Regulations and Procedures of the Department of State in order to consider this charge, with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State
365 Appropriation Act, 1950, Section 104, Public Law 179, 81st Congress, First Session, your employment in

the Department should be terminated in the interest of the United States.

You are hereby notified and afforded an opportunity of appearing at such a hearing to be held by the Loyalty Security Board at 10:00 A.M. on April 20, 1950, in Room 2254, New State Department Building, Washington, D. C. You will be in regular duty and pay status pending the outcome of this hearing.

You are also informed that it is your privilege to reply to these charges in writing before the date set for your hearing or to appear before the Loyalty Security Board at this hearing, to be accompanied, if you so desire, by counsel or representative of your own choosing, and to present evidence in your own behalf, through witness or by affidavit.

In the event you desire further details in order adequately to prepare your answer to this charge, the undersigned is available to discuss the matter with you and your representative.

Sincerely yours,
For the Secretary of State:
Conrad E. Snow
Chairman
Loyalty Security Board

Enclosures:

Regulations and Procedures of the
Department of State,
Notice regarding Evidence.

113 Filed November 1, 1952

EXHIBIT F

Stipulation between Hiram Bingham, Chairman of the Loyalty Review Board, and C. E. Rhetts, counsel for John Stewart Service.

It is agreed by and between C. E. Rhetts, Attorney for John Stewart Service, and Hiram Bingham, Chairman of the Loyalty Review Board, that the matter of John Stewart Service, an employee of the Department of State, is now before the Loyalty Review Board for consideration under Regulation 14 of the Statement, Regulations and Directives of the Loyalty Review Board, and that heretofore Service has been afforded a hearing before a panel of the Loyalty Review Board, composed of George W. Alger, Henry L. Shattuck and John K. Clark, at which time considerable evidence was taken as to whether or not John Stewart Service disclosed information of a confidential or non-public character within the meaning of subparagraph d of paragraph 2a of Part V, Standards, of Executive Order No. 9835, as amended. In a review of the letter of charges preferred against John Stewart Service on March 24, 1950 by the Department of State it is noted that the specific charges set forth under Executive Order No. 9835, as amended, are within the meaning of Section 392.2 of the regulations and procedures of the Department of State, which are in substance subparagraph f of paragraph 2a of Part V, Standards, of Executive Order No. 9835, as amended, and said letter of charges does not state specifications regarding the intentional and unauthorized disclosure of information of a confidential or non-public character. Therefore, in order that the Loyalty Review Board may follow its orderly processes of review and to avoid returning the case to the Department of State for an amendment to the said letter of charges,

114 It is hereby stipulated by and between C. E. Rhetts, Attorney for John Stewart Service, and Hiram Bingham, Chairman of the Loyalty Review Board, that the said panel of the Loyalty Review Board may consider the entire matter and make a determination thereon as if the original letter of charges served on John Stewart Service,

dated March 24, 1950, contained the following specification within the meaning of section 392.2d of the regulations and procedures of the Department of State:

> "Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States."

Provided, however, that the case before this Board shall be considered as if the Department of State Loyalty-Security Board had made a determination that no reasonable doubt of Service's loyalty exists when the facts are considered in relation to said section 392.2d and that the foregoing stipulation shall not be deemed to alter or affect in any way the significance properly attributable to the failure of the Department of State in fact to lay a charge of disloyalty under said section 392.2d and its determination instead to lay a security risk charge under section 393.1a of its regulations.

/s/ C. E. Rhetts
C. E. Rhetts
Attorney for John Stewart Service

/s/ Hiram Bingham
Hiram Bingham
Chairman, Loyalty Review Board

Washington, D. C.
December 4, 1951

115 Filed November 1, 1952

EXHIBIT G

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

December 13, 1951

The Honorable
The Secretary of State

Sir:

Reference is made to the case of John Stewart Service, Foreign Relations Officer of the Department of State.

This case came to the attention of the Loyalty Review Board on post-audit after a favorable finding by the Loyalty Security Board of the Department of State. A panel of the Loyalty Review Board was duly assigned to review the matter and, on March 3, 1950, the panel recommended that it be remanded to the Loyalty Security Board of the Department of State for a hearing on charges. Thereafter, the employee was duly presented with a letter of charges and notice of proposed removal action, dated March 24, 1950, in accordance with Executive Order No. 9835. Subsequently, a hearing was held by the Loyalty Security Board of the Department of State and said Board reaffirmed its decision, favorable to the employee. Pending reconsideration of this decision on post-audit, supplementary information was received from the Federal Bureau of Investigation and the complete file was returned to the Loyalty Security Board of the Department of State for such consideration as it deemed advisable. Executive Order No. 9835 was amended by Executive Order No. 10241 on April 28, 1951 and the case was considered by the Loyalty Security Board of the Department of State under the

amendment to Executive Order No. 9835 and that Board thereafter reaffirmed its favorable action.

116. The case again came before the Loyalty Review Board on post-audit and, under date of October 9, 1951, the panel of the Loyalty Review Board determined that it was necessary to hold a hearing before the panel of the Loyalty Review Board under its Regulation 14.

A hearing was accordingly held by the panel at the offices of the Loyalty Review Board in Washington, D. C., on November 8, 1951, at which the employee was present and testified and was represented by his counsel, Charles Edward Rhetts of Washington, D. C.

On December 4, 1951, a stipulation was entered into by and between Hiram Bingham, Chairman of the Loyalty Review Board, and C. E. Rhetts, Attorney for John Stewart Service, wherein it was stipulated "that the said panel of the Loyalty Review Board may consider the entire matter and make a determination thereon as if the original letter of charges served on John Stewart Service, dated March 24, 1950, contained the following specification within the meaning of section 392.2d of the regulations and procedures of the Department of State:

> "'Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States'."

A copy of said stipulation is attached hereto.

Thereafter, the said panel of the Loyalty Review Board, upon a consideration of all the evidence and the complete file in the matter, found that there is a reasonable doubt as to the loyalty of said employee, John Stewart Service, to the Government of the United States. A copy of the decision of the panel is also attached hereto.

The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization
117 on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V, "Standards," of Executive Order No. 9835, as amended.

The Loyalty Review Board hereby submits to the Secretary of State its opinion: The employee, John Stewart Service, should be forthwith removed from the rolls of the Department of State; the Secretary should approve and adopt the proceedings had, as heretofore recited herein; and such approval and adoption should appear on Standard Form 50, "Notification of Personnel Action."

Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service.

For the Loyalty Review Board:

Sincerely yours,
Hiram Bingham
Chairman
Loyalty Review Board

Filed November 1, 1952

EXHIBIT H

DEPARTMENT OF STATE
FOR THE PRESS

DECEMBER 13, 1951 NO. 1088

The Department of State announced today that the Loyalty Review Board of the Civil Service Commission

118 has advised the Department that this Board has found a reasonable doubt as to the loyalty of John Stewart Service, Foreign Service Officer.

Today's decision of the Loyalty Review Board is based on the evidence which was considered by the Department's Board and found to be insufficient on which to base a finding of "reasonable doubt" as to Mr. Service's loyalty or security. Copies of the Opinions of both Boards are attached.

The Department of State's Loyalty Security Board, on July 31, 1951, had reaffirmed its earlier findings that Service was neither disloyal nor a security risk; and the case had been referred to the Loyalty Review Board for post-audit on September 4, 1951. The Loyalty Review Board assumed jurisdiction of Mr. Service's case on October 9, 1951.

The Chairman of the Loyalty Review Board in today's letter to the Secretary (full text attached) noted:

> "The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V, 'Standards,' of Executive Order No. 9835, as amended."

The Opinion of the Loyalty Review Board stressed the points made above by the Chairman—that is, it stated that the Board was not required to find and did not find Mr. Service guilty of disloyalty, but it did find that his intentional and unauthorized disclosure of confidential documents raised reasonable doubt as to his loyalty. The

119 State Department Board while censoring Mr. Service

for indiscretions, believed that the experience Mr. Service had been through as a result of his indiscretions in 1945 had served to make him far more than normally security conscious. It found also that no reasonable doubt existed as to his loyalty to the Government of the United States. On this point the State Department Board was reversed.

The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. These Regulations are binding on the Department of State.

The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

LETTER FROM THE CHAIRMAN OF THE LOYALTY REVIEW BOARD TO THE SECRETARY OF STATE:

December 13, 1951

[The full text of this letter is printed as Exhibit G hereto, at pages 33-35.]

OPINION OF THE LOYALTY SECURITY BOARD OF THE DEPARTMENT OF STATE

October 6, 1950

[The full text of the opinion of the Loyalty Security Board of the Department of State is printed as Exhibit B hereto, at pages 12-28.]

OPINION OF THE LOYALTY REVIEW BOARD

December 12, 1951

[The full text of the opinion of the Loyalty Review Board is printed as Exhibit A hereto, at pages 1-11.]

366 Filed November 1, 1952

EXHIBIT M

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

April 1, 1952

Reilly, Rhetts and Ruckelshaus
Tower Building
14th and K Streets, N. W.
Washington 5, D. C.

Attention: C. E. Rhetts, Esq.

Dear Mr. Rhetts:

Reference is made to your letter of January 7, 1952 to the United States Civil Service Commission in the matter of John Stewart Service.

Please be advised that the decision rendered by the Loyalty Review Board to the Secretary of the Department of State was in the nature of a recommendation. The Secretary of State acting upon the recommendation terminated the services of Mr. Service pursuant to
367 Executive Order 9835 as amended and Public Law 188, section 103, 82nd Congress approved October 22, 1951.

The Civil Service Commission has no power to review the action of a Department Head involving the dismissal of an employee for reasons of loyalty and security and furthermore it is noted that Mr. Service was a Foreign Service officer, an employee in a service in which the employment and dismissal of persons is within the exclusive province of the Secretary of the Department of State.

Under the circumstances outlined above the Commission cannot take the actions requested in your letter.

By direction of the Commission.

Sincerely yours,

Robert Ramspeck
Chairman

120 Filed October 20, 1953, Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4967-52

JOHN S. SERVICE, 123-35 82nd Road, Kew Gardens 15, New York, New York, *Plaintiff*,

v.

HIRAM BINGHAM, Individually and as Chairman of the Loyalty Review Board of the United States Civil Service Commission, JOHN KIRKLAND CLARK, HENRY L. SHATTUCK, GEORGE W. ALGER, BERTRAM L. FRENCH, HARRY W. BLAIR, JOHN H. AMEN, BRADFORD BOSLEY, HENRY L. BOWDEN, PHILIP O. COFFIN, CLEM W. COLLINS, HARRY W. COLMERY, EDWIN A. COTTRELL, MARION WADE DOYLE, CATHERINE PRATT FIELD, DR. META GLASS, PAUL M. HERBERT, MARSHALL B. HENSHAW, JOHN H. HESSEY, GARRETT S. HOAG, ALBERT E. JENNER, JR., WILLARD L. KING, HENRY PARKMAN, ROLLIN B. POSEY, HENRY REINING, JR., MURRAY SEASONGOOD, JUDGE A. E. STEADMAN, ANDREW STEERS, C. NILS TAVARES, JAMES F. TWOHY, ELIOT WADSWORTH, Individually and as Members of the Loyalty Review Board of the United States Civil Service Commission; PHILIP YOUNG, Individually and as Chairman of the United

States Civil Service Commission, FREDERICK LAWTON, GEORGE M. MOORE, Individually and as Members of the United States Civil Service Commission; JOHN FOSTER DULLES, Individually and as Secretary of State of the United States of America; UNITED STATES CIVIL SERVICE COMMISSION; and the LOYALTY REVIEW BOARD OF THE UNITED STATES CIVIL SERVICE COMMISSION, *Defendants.*

THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MANDATORY ORDER

1. This is a civil action for a Declaratory Judgment and a Mandatory Order arising under the Constitution and laws of the United States. The amount in controversy exceeds $3,000, exclusive of interest and costs.

2. Jurisdiction of this Court over the subject matter is founded upon United States Code, Title 28, §§ 1331, 1332, 2201 and 2202, United States Code, Title 5, § 1009 and District of Columbia Code, §§ 11-301, 11-305 and 11-306.

121 3. Hiram Bingham, Chairman, John Kirkland Clark, Henry L. Shattuck, George W. Alger, Bertram L. French, Harry W. Blair, John H. Amen, Bradford Bosley, Henry L. Bowden, Philip O. Coffin, Clem W. Collins, Harry W. Colmery, Edwin A. Cottrell, Marion Wade Doyle, Catherine Pratt Field, Dr. Meta Glass, Paul M. Herbert, Marshall B. Henshaw, John H. Hessey, Garrett S. Hoag, Albert E. Jenner, Jr., Willard L. King, Henry Parkman, Rollin B. Posey, Henry Reining, Jr., Murray Seasongood Judge A. E. Steadman, Andrew Steers, C. Nils Tavares, James F. Twohy, Eliot Wadsworth are members of the Loyalty Review Board of the United States Civil Service Commission, hereinafter called "the Loyalty Review Board." The official residence of each of them is in the District of

Columbia. Said defendants are sued individually and as members of the Loyalty Review Board. Philip Young is Chairman of the United States Civil Service Commission, and Frederick Lawton and George M. Moore are members thereof. The official residence of each of them is in the District of Columbia. Said defendants are sued individually and as members of the United States Civil Service Commission.

4. Defendant John Foster Dulles is Secretary of State of the United States of America and has his official residence in the District of Columbia. Said defendant is sued individually and as Secretary of State of the United States of America.

5. Plaintiff is a citizen of the United States and resides at 123-35 82nd Road, Kew Gardens 15, New York.

6. After serving as Foreign Service Clerk and Vice Consul (Non-Career) at the American Consulate at Kunming, China in 1933 and 1934, plaintiff was in October, 1935 appointed by the President, by and with the consent of the Senate, as a Foreign Service Officer in the lowest beginning grade of such Service.

7. From October, 1935 until December 14, 1951, plaintiff served continuously as a Foreign Service Officer of the United States of America, advancing by promotion to Class 2 of the Foreign Service.

8. By letter dated March 24, 1950 from Conrad E. Snow, Chairman of the Loyalty Security Board of the Department of State, plaintiff was presented with charges (for-
122 mulated pursuant to the regulations and procedures of the Department of State issued under Executive Order 9835, 12 F.R. 1935). The charges were:

> "The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the

Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority."

9. After exhaustive hearings on the charges referred to in paragraph 8, the Loyalty Security Board of the Department of State, in an opinion dated October 6, 1950 (attached to the original complain herein as Exhibit B and hereby incorporated herein by reference as Exhibit B) concluded in part:

"The Loyalty Security Board has given extended, careful and earnest attention to this case, and concludes, on the basis of all the evidence, that reasonable grounds do not exist for belief that John Stewart Service is disloyal to the Government of the United States. The Board further concludes that, notwithstanding a single serious indiscretion in the handling of classified information, he does not constitute a security risk to the Department of State."

10. Following the issuance on April 28, 1951 of Executive Order 10241, 16 F.R. 3690, which amended the standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty, the Loyalty Security Board further considered the case of plaintiff on July 31, 1951 and "determined that no reasonable doubt exists as to his loyalty to the United States Government".

11. The findings of fact and conclusions of the Loyalty

Security Board favorable to plaintiff referred to in paragraphs 9 and 10 were approved and adopted by or on behalf of the Secretary of State.

12. On October 11, 1951, defendant Bingham, in his official capacity as Chairman of defendant Loyalty Review Board notified plaintiff of the determination of defendant Loyalty Review Board to hold a hearing in plaintiff's case in the "public interest" pursuant to Regulation 14 of
123 that Board "based upon the charges heretofore issued to you by the Department of State Loyalty Security Board and the issues to be heard at the hearing will be within the framework of those charges . . .".

13. On November 8, 1951 defendant Loyalty Review Board held a hearing before a panel of three of its members consisting of defendants George W. Alger, John Kirkland Clark and Henry L. Shattuck, supplemented during portions thereof by defendant Bingham, at which plaintiff was present and testified and was represented by counsel. No other witness testified in the course of this hearing.

14. Prior to, or in the course of, the hearing referred to in paragraph 13, plaintiff was furnished with no charges, formal or otherwise, in addition to or other than those with which he had been furnished on March 24, 1950, as alleged in paragraph 8 above.

15. On or about December 3, 1951, defendant Loyalty Review Board notified plaintiff that, after considering a brief filed by his counsel following the hearing of November 8, 1951, defendant Loyalty Review Board desired to add a charge not theretofore preferred against him and to consider his case on the basis of such added charge. Plaintiff was further advised that if he would not agree to a stipulation permitting defendant Loyalty Review Board to consider such added charge, defendant Loyalty Review Board would remand the case to the Department of State

with instructions to initiate new proceedings against plaintiff based on the new charge which it now wished to insert into the case. Plaintiff consented to and did enter into a formal stipulation between plaintiff's counsel and defendant Bingham (attached to the original complaint herein as Exhibit F and herby incorporated herein by reference as Exhibit F).

16. Neither by the stipulation referred to in paragraph 15 nor by any other means did defendant Loyalty Review Board furnish to plaintiff, as required by its regulations, any "notice in writing stating the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense or explanation."

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17. In neither the formal stipulation nor in any informal agreement, written or otherwise, did plaintiff in any manner agree that defendant Loyalty Review Board was to have any jurisdiction which it did not otherwise have.

18. Plaintiff has never at any time had any hearing of any nature whatsoever upon the charge as added by the stipulation of December 4, 1951, as hereinbefore alleged, nor was he at any time offered any opportunity to have any hearing by any hearing board or body on such added charge.

19. By a letter, dated December 13, 1951 (attached to the original complaint herein as Exhibit G and hereby incorporated herein by reference as Exhibit G) defendant Bingham notified the Secretary of State that defendant Loyalty Review Board had found "that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character

within the meaning of subparagraph d of paragraph 2 of Part V, 'Standards', of Executive Order 9835, as amended" and enclosed the "decision" of the panel of its members, which was that "the favorable finding of the Loyalty Security Board of the Department of State is accordingly reversed". Said "decision" or opinion was attached to the original complaint herein as Exhibit A and is hereby incorporated herein by reference as Exhibit A.

20. During the course of hearings before the Loyalty Security Board of the Department of State and before defendant Loyalty Review Board, plaintiff was advised that those Boards were in possession of information concerning the substance of conversations between plaintiff and one, Philip J. Jaffe held on April 19, 20, May 8 and 29, 1945 in Jaffe's room in the Statler Hotel in Washington.

21. On information and belief, plaintiff alleges that the Federal Bureau of Investigation had on or shortly prior to April 19, 1945 placed a microphone in the hotel
125 room of the aforementioned Jaffe and had connected the same to a phonographic recording device and did thereby record a portion of or all of certain conversations between plaintiff and Jaffe on April 19, 1945 and, by the same practice and device, a portion of or all of certain conversations between plaintiff and Jaffe in Jaffe's hotel room on April 20, 1945, May 8, 1945 and May 29, 1945. On information and belief, plaintiff further alleges that purported stenographic transcripts of a portion of or all of such recordings were prepared by agents or employees of the Federal Bureau of Investigation and that, at sometime prior to June 26, 1950, the said original recordings were destroyed by the Federal Bureau of Investigation. No original recording of any such conversation has ever come into the possession of plaintiff by any means whatever nor has plaintiff been permitted to hear such recordings at any time by any means whatsoever nor has plaintiff at any

time by any means whatsoever been furnished with or permitted to examine all or any portion of any transcript of such recordings, except a paper exhibited to him on June 26, 1950, by a subcommittee of the Senate Committee on Foreign Relations, established pursuant to Senate resolution 231, 81st Congress, 2d Session, and represented to be a verbatim text of the conversation between plaintiff and Jaffe held on May 8, 1945 which text was in fact a purported partial transcript of said conversation plus a purported summary and characterization of what was said and contains on its face indications that the stenographer or clerk preparing such transcript from the phonographic recording was unable to hear or understand accurately the words employed by plaintiff and Jaffe and that the purported transcript and summaries and characterizations of what was said were in many respects inaccurate, garbled, incomplete and incorrect.

22. On information and belief, plaintiff alleges that, except for digests, summaries, epitomizations and characterizations, of the recordings or notes referred to in paragraph 21 above, and except for plaintiff's own testimony concerning the said conversations, nothing was before either the Loyalty Security Board or defendant Loyalty Review Board reflecting the contents of the said conversations, and alleges more particularly that neither an actual re-
126 cording nor any notes taken by any person listening to the said conversations nor any complete transcript of the said entire conversations was ever before either the Loyalty Security Board or defendant Loyalty Review Board or was considered by either Board.

23. On information and belief, plaintiff alleges that throughout all of the purported transcripts or summaries, prepared as hereinbefore alleged, of the conversations between plaintiff and Jaffe on April 19, 20, May 8 and 29, 1945 in Jaffe's room at the Statler Hotel in Washington,

frequent errors were made in transcribing what was said or in summarizing and characterizing what was said with the result that both the purported stenographic transcriptions of the conversations and the characterizations and summaries thereof were in many respects inaccurate, garbled, incomplete and incorrect.

24. Although plaintiff formally and informally requested the Loyalty Security Board of the Department of State to furnish him with the original recordings of the conversations between plaintiff and Jaffe at the times and places alleged and with transcripts, summaries and characterizations made thereof as alleged, plaintiff was at no time either in the course of the hearing before the Loyalty Security Board, defendant Loyalty Review Board or otherwise, furnished with copies of or permitted to hear any such recording, transcript, summary or characterization of such conversations and plaintiff was furnished no sufficient information by either of such Boards, or in the charges preferred against him as to what he was supposed to have said to Jaffe or as to what Jaffe was supposed to have said to him and was therefore without means of clarifying the purported stenographic transcript of the conversations or the summaries or characterizations thereof or of correcting inaccuracies therein or of explaining them, other than his own recollection of what took place more than 6 years prior to the first of his hearings before the Loyalty Security Board and was without any adequate means of defending himself with respect to any charge which might be made relating to such conversations.

25. No investigative technique or procedure would have been revealed to plaintiff, or otherwise further disclosed by permitting plaintiff to hear the original recordings
127 of such intercepted conversations or to examine the purported transcripts or summaries and characterizations thereof.

26. On information and belief, plaintiff alleges that no confidential informant, as that term is generally understood or is properly used, gave any information either to the Federal Bureau of Investigation or any other security agency of the United States Government concerning any of the said conversations between plaintiff and Jaffe.

27. No consideration of national security or any other proper consideration involving the interests of the United States required or justified either the destruction of the original recordings of the interceptions of the said conversations between plaintiff and Jaffe or the withholding from plaintiff of any recordings, purported transcripts or purported summarizations or characterizations thereof.

28. On information and belief plaintiff alleges that in connection with the investigation of plaintiff's loyalty by the Secretary of State and in connection with the hearings held by the Loyalty Security Board of the Department of State and the hearing held by defendant Loyalty Review Board, neither the Secretary of State, the Loyalty Security Board nor defendant Loyalty Review Board ever requested the Federal Bureau of Investigation to make available to him or them the original recordings of the conversations between plaintiff and Jaffe had on the dates and at the place hereinbefore alleged nor did he or they request that there be made available at either of said hearings the testimony of such person or persons as may have prepared the purported transcripts, summarizations or characterizations of such conversations which were considered by said Boards.

29. As reflected in the opinion of defendant Loyalty Review Board which purported to reverse the finding of the Loyalty Security Board of the Department of State and which purports to be the basis of the direction of defendant Loyalty Review Board that the employment of plaintiff by the Department of State be terminated, the only considera-

tions asserted to form the basis of such reversal and such direction relate to plaintiff's dealings with Jaffe and particularly to his aforementioned conversations with Jaffe.

30. On information and belief, plaintiff alleges
128 that telephone interceptions or wire taps were employed in the course of investigating the so-called "Amerasia Case" and that, particularly, telephone conversations between the several persons arrested on June 6, 1945, in the Amerasia Case, were so intercepted by investigative agents of the United States Government and, more particularly, that such intercepted conversations related in part to plaintiff and reflected the opinion of one or more of the persons, other than plaintiff, arrested in connection with the Amerasia Case, that the persons actively engaged in the Amerasia Case were wasting their time with plaintiff and that he was not only not a Communist but not even a liberal. No security consideration existed in 1950 or thereafter for withholding from plaintiff that portion of the wire tap information relating to him above referred to. At no time before the Loyalty Security Board or the Loyalty Review Board or at any other time has plaintiff been furnished with or in any manner given access to the said portions of the wire taps relating to him or any notes or transcripts thereof.

31. The action of defendant Loyalty Review Board in purporting to reverse the favorable finding of the Loyalty Security Board of the Department of State was not a decision based on the merits of plaintiff's case and the evidence therein relating either to the charge preferred against him by the State Department Loyalty Security Board or to the charge introduced after the Loyalty Review Board's hearing in this case, but was a decision made on the basis of extraneous considerations unrelated to the merits of the case, including, (a) the avoidance of further attacks upon defendant Loyalty Review Board by yielding to the

political clamor hostile to plaintiff as a Government employee; and (b) the utilization of plaintiff's case, without regard to its merits and the evidence therein, as a vehicle by which to express defendant Loyalty Review Board's dissatisfaction with the loyalty program as conducted within the Department of State and to redress or affect the total statistical outcome of hearings conducted by the Loyalty Security Board of the Department of State and otherwise to discipline and bring pressures to bear upon the Loyalty Security Board of the Department of State.

32. Defendant Loyalty Review Board's opinion
129 contains no finding which purports to sustain either the charge preferred against plaintiff by the Loyalty Security Board of the Department of State or the charge added by defendant Loyalty Review Board.

33. The record before defendant Loyalty Review Board contains no substantial evidence that plaintiff ever made any unauthorized disclosure of documents or information of a confidential or non-public character to any person, or that plaintiff ever made such an unauthorized disclosure under circumstances indicating his disloyalty to the United States.

34. Without affording plaintiff any opportunity to appeal to him or address any arguments to him, although requested so to do by plaintiff, the Secretary of State determined, within four hours of receipt of defendant Bingham's letter of December 13, 1951, to discharge plaintiff and caused a letter to be sent to plaintiff on that date terminating his employment effective at the close of business December 14, 1951.

35. On December 13, 1951, the Secretary of State issued or caused to be issued a public statement in the form of a press release (attached to the original complaint herein as Exhibit H and hereby incorporated herein by reference

as Exhibit H) to which was annexed the letter referred to in paragraph 19, Exhibit G, the opinion of the Loyalty Review Board of the Department of State dated October 6, 1950 and its supplement dated July 31, 1951 (Exhibit B) and the opinion of defendant Loyalty Review Board dated December 12, 1951 (Exhibit A).

36. Neither the Secretary of State nor any agent or representative of his designated for that purpose made any independent decision or recommended decision, either on December 13, 1951 or at any time prior thereto, on the basis of a consideration of the loyalty file in plaintiff's case, that plaintiff's employment as a Foreign Service Officer of the United States should be terminated.

37. The action of the Secretary of State in discharging plaintiff from his employment as a Foreign Service Officer of the United States was based solely upon the ground that this action was, as a matter of law, required
130 as a result of the action of defendant Loyalty Review Board.

38. Plaintiff has in every respect exhausted every administrative remedy available to him.

39. Plaintiff's discharge by the Secretary of State from his employment as a Foreign Service Officer of the United States was in violation of law and invalid, because, though purportedly effected pursuant to the authority conferred on the Secretary of State by Executive Order 9835 (12 F.R. 1935), as amended by Executive Order 10241 (16 F.R. 3690), such discharge in fact violated such Executive Orders and the valid regulations promulgated by defendant Loyalty Review Board pursuant to Part III, Sec. 1, subsection b thereof, in the following grave and highly prejudicial respects:

(a) the Secretary of State was without authority under Executive Order 9835, as amended, to discharge plaintiff

for the reasons assigned by him and his subordinate, Deputy Under Secretary (Administration), namely that defendant Loyalty Review Board's conclusion adverse to plaintiff was mandatory and binding on the Secretary of State and required him to discharge plaintiff;

(b) defendant Loyalty Review Board is without authority under Executive Order 9835 in any case to make, as it purported to make in plaintiff's case, a determination binding upon the head of an employing department with respect to the loyalty of any government employee;

(c) defendant Loyalty Review Board had no authority to make an advisory recommendation to the Secretary of State in respect of plaintiff's loyalty for the reason that defendant Loyalty Review Board was established by Executive Order 9835 to act on the merits of individual cases only in the event of an appeal to it by an employee from a decision of the head of an employing department to discharge such employee on grounds relating to loyalty, whereas no appeal was taken to defendant Loyalty Review Board in plaintiff's case, the finding of the State Department Loyalty Security Board and of the Secretary of State having been favorable to plaintiff;

(d) the Secretary of State had no authority to give any effect whatsoever to defendant Loyalty Review Board's opinion, either as a binding determination or as an advisory recommendation;

131 (e) neither the Secretary of State nor any subordinate delegated by him to make such a determination, determined that on all the evidence there is reasonable doubt as to the loyalty of plaintiff;

(f) plaintiff was denied an opportunity to appeal to the Secretary of State or to such person as he might have designated, from any recommendation or removal;

(g) plaintiff was not served with a notice "stating the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the

charges so far as security considerations will permit", as required by the regulations of defendant Loyalty Review Board, nor was he accorded the hearing required by Executive Order 9835, as amended, in that, despite his repeated requests therefor, and despite the absence of any necessity for protecting confidential information, he was not at any time furnished with such information as was available, or which should have been available, to the Loyalty Security Board and to defendant Loyalty Review Board in the form of recordings, transcripts, summaries and characterizations of the conversations between plaintiff and Jaffe on April 19 and 20 and May 8 and 29, 1945, which information was relied upon by defendant Loyalty Review Board as the basis for its conclusion that a reasonable doubt exists as to plaintiff's loyalty to the Government of the United States;

(h) neither defendant Loyalty Review Board nor the Secretary of State made reasonable efforts or any efforts to induce all identified non-confidential witnesses who have given pertinent information adverse to plaintiff to attend either the hearing before the Loyalty Security Board or defendant Loyalty Review Board and testify in plaintiff's presence and subject themselves to cross-examination, as required by the regulations of defendant Loyalty Review Board;

(i) in reaching its decision in plaintiff's case, defendant Loyalty Review Board considered and relied upon matters not properly before it and not proper for consideration as evidence by it, in that it considered and relied upon recordings or purported transcripts, summaries or characterizations, made by unknown persons, of the conversations between plaintiff and Jaffe on April 19 and 20 and
132 May 8 and 29, 1945, which were never in any manner furnished plaintiff and which were not introduced as evidence in the record of the Loyalty Security Board or of defendant Loyalty Review Board, in consequence of

which plaintiff was denied an opportunity to challenge their accuracy and reliability and to cross-examine the person or persons who purported to make such transcripts, summaries or characterizations;

(j) plaintiff was never accorded a hearing upon the charges which defendant Loyalty Review Board purported to sustain and on the basis of which it purported to find a reasonable doubt of plaintiff's loyalty;

(k) plaintiff was not accorded the hearing intended by the Executive Order nor was defendant Loyalty Review Board's conclusion against him based on all the evidence as required by the Executive Order, in that the Loyalty Review Board did not make available to plaintiff information favorable to him which was or should have been available to it;

(l) defendant Loyalty Review Board's conclusion that there is reasonable doubt as to plaintiff's loyalty to the United States is arbitrary and unreasonable in that it is based upon no finding which purports to sustain either the charge preferred against him by the State Department Loyalty Security Board, or the charge added by defendant Loyalty Review Board;

(m) there is no substantial evidence in the record before defendant Loyalty Review Board that plaintiff is, or ever was, a member of, or in sympathetic association with, the Communist Party, or that plaintiff ever made any "intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of confidential or non-public character . . .";

(n) plaintiff was not accorded the hearing intended by the Executive Order because defendant Loyalty Review Board reached its conclusion against him because of bias and prejudice and as a result of a prejudgment of plaintiff's case and on the basis of considerations other than the evidence for and against plaintiff.

40. Plaintiff's discharge by the Secretary of State from his employment by the State Department of the United States was invalid and was not authorized by Sec-
133 tion 103, Public Law 188, 82nd Congress, in that.

(a) in discharging plaintiff neither the Secretary nor his Deputy Under Secretary (Administration) purported to make any determination that such discharge was "necessary or advisable in the interests of the United States" but acted solely for the reason that plaintiff's discharge was mandatory upon them under Executive Order 9835, as amended, in consequence of the action of defendant Loyalty Review Board;

(b) in connection with plaintiff's discharge, the Secretary of State did not personally make a determination that such discharge was "necessary or advisable in the interests of the United States", although the making of such a determination is required in order to effectuate the lawful termination of the employment of an officer or employee pursuant to Section 103, Public Law 188, 82nd Congress;

(c) in connection with plaintiff's discharge, the Secretary of State did not accept or adopt the determination of any subordinate officer of the Department of State that such discharge was "necessary or advisable in the interests of the United States"; and no subordinate officer or representative of the Secretary of State made any such determination;

(d) the Secretary of State was without authority under Section 103, Public Law 188, 82nd Congress, to terminate plaintiff's employment with the Department of State solely on the basis of the findings and opinion of defendant Loyalty Review Board or on the basis of the directions contained in defendant Bingham's letter of December 13, 1951 to the Secretary of State because,

(1) the authority conferred upon the Secretary of State to make determinations with respect to the termination of employment of officers or employees of the Department

of State by Section 103, Public Law 188 may not lawfully be delegated by the Secretary of State to another agency of the Government of the United States or to any part thereof or to any individuals who are not subordinates of the Secretary of State or officers of the Department of State;

(2) the Secretary of State has never delegated or purported to delegate the authority conferred upon him by Section 103, Public Law 188 to defendant Loyalty Review Board or to any of its members;

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(3) as elsewhere herein alleged, the proceedings held by defendant Loyalty Review Board and its findings in respect to plaintiff in numerous respects failed to conform to the requirements of Executive Order 9835, as amended, and to the requirements of the Constitution of the United States and, accordingly, its purported reversal of the findings and determination of the Secretary of State and his Loyalty Security Board was without validity or force and should have been disregarded.

41. Plaintiff's discharge by the Secretary of State from his employment as a Foreign Service Officer of the United States was in violation of law and invalid in that prior thereto plaintiff was accorded no hearing before the Board of the Foreign Service as required by the Act of August 13, 1946, c. 951, Title VI, §§ 637, 638, 60 Stat. 1016, 22 USCA, §§ 1007, 1008.

42. The Secretary of State's discharge of plaintiff from his employment deprived plaintiff of rights guaranteed him by the Fifth Amendment to the Constitution of the United States in that such discharge was made on the basis of the findings and opinion of defendant Loyalty Review Board which were promulgated,

(a) without according to plaintiff a fair opportunity to defend himself against charges pertaining to his loyalty, because of the unjustified failure to give him adequate

notice of those charges and information favorable to him which was or should have been in the possession of the Loyalty Security Board or defendant Loyalty Review Board as well as that information against him which supplied the major bases of the conclusion against him;

(b) without a fair adjudication of the charges pertaining to plaintiff's loyalty, because the conclusion against him was not based on all, or the most reliable, evidence pertaining thereto;

(c) on the basis of a conclusion against plaintiff by defendant Loyalty Review Board which was biased and prejudiced, had prejudged plaintiff's case and made its finding and issued its opinion on the basis of political pressures rather than on the basis of the evidence for and against plaintiff;

(d) on the basis of a wholly irrational, arbitrary and unsupported conclusion that there was reasonable
135 doubt of plaintiff's loyalty to the Government of the United States;

(e) although in fact plaintiff is not and was not a person of doubtful loyalty to the Government of the United States, and his discharge on this ground and a determination to this effect is and was wholly unreasonable;

(f) without the regular and orderly procedure, with the safeguards of the right to appeal and the right to an adjudication by the head of the employing department as to the employee's loyalty, which is and was customarily and regularly accorded to other employees in plaintiff's situation and against whom similar charges are or have been brought;

(g) without according to plaintiff a judicial trial on the charges against him before an impartial jury under circumstances in which he was clearly informed of the charge against him, with opportunity to confront and cross-examine the witnesses against him;

(h) on the basis of the activities of plaintiff in connection with Jaffe in April or May 1945, whereas Executive Order 9835 was issued on March 21, 1947 and, as applied to the said activities of plaintiff with Jaffe, is, therefore, *ex post facto*.

43. The action of the Secretary of State in announcing to the press on December 13, 1951 that he had discharged plaintiff on the ground that defendant Loyalty Review Board had found reasonable doubt as to plaintiff's loyalty and in simultaneously releasing to the press defendant Bingham's letter directing this discharge and the opinion of defendant Loyalty Review Board and the action of defendant Bingham in publishing his letter to the Secretary of State and the opinion of defendant Loyalty Review Board, deprived plaintiff of his common law right to be free from unjustified defamation of character in violation of the guarantees of the Fifth Amendment to the Constitution, in that the proceedings, as a result of which plaintiff was discharged on December 13, 1951, denied him due process of law and were otherwise illegal in the respects and for the reasons more particularly alleged above.

44. The discharge of plaintiff from the Department of State by the Secretary of State on December 13, 1951, upon the basis of the opinion of defendant Loyalty Review
136 Board and the letter of December 13, 1951 from defendant Bingham directing plaintiff's discharge and the attendant branding of plaintiff as a person of doubtful loyalty, constituted the imposition upon plaintiff of punishment, which punishment could not lawfully be imposed by a procedure which did not afford plaintiff all of the safeguards of a judicial trial. The proceedings hereinbefore alleged which led to plaintiff's discharge on December 13, 1951 did not accord plaintiff such safeguards and were, accordingly, unlawful and void, in violation of

the Sixth Amendment to the Constitution of the United States.

45. Every activity of any kind whatsoever of plaintiff in connection with Jaffe, which activities comprise the sole ground upon which defendant Loyalty Review Board purported to find that a reasonable doubt existed as to plaintiff's loyalty, took place in April or May 1945. Executive Order 9835 was issued on March 21, 1947 and, therefore, insofar as applied to the said activities of plaintiff with Jaffe, is an *ex post facto* law which is unlawful under Article I, Section 9, of the Constitution of the United States.

46. Plaintiff has no full and adequate remedy at law for the irreparable damage he has suffered and continues to suffer as a result of his unlawful discharge from his employment by the State Department, his loss of his career in the Foreign Service of the United States, his loss of numerous valuable property rights incident to his status as a Foreign Service Officer, and as a result of the grave and continuing injury to his reputation resulting from the illegal defamation of his character by the publication of defendants' purported finding of a reasonable doubt as to his loyalty to the Government of the United States.

WHEREFORE, plaintiff prays,

I

1. That his discharge by the Secretary of State be declared void and invalid, in that it violates the Constitution of the United States, The Foreign Service Act of 1946, Section 103 of Public Law 188, 82nd Congress, and Executive Order 9835, as amended, and valid regulations issued pursuant thereto.

437 2. That defendants Civil Service Commission, Loyalty Review Board and its defendant members be directed to withdraw and vacate the letter of direction addressed by defendant Bingham to the Secretary of State

on December 13, 1951 and the findings, opinion and purported order of reversal issued by defendant Loyalty Review Board and defendants Bingham, Alger, Clark and Shattuck.

3. That all defendants be directed to expunge from their records the said letter from defendant Bingham to the Secretary of State dated December 13, 1951, together with the findings, opinion and purported order of reversal of defendant Loyalty Review Board and defendants Bingham, Alger, Clark and Shattuck and that the Secretary of State further be directed to expunge from the records of the Department of State all written statements of any kind reflecting that plaintiff's employment has been terminated by the Department of State on the ground that there was or is reasonable doubt as to plaintiff's loyalty to the Government of the United States.

4. That the defendant Secretary of State be directed to reinstate plaintiff to his employment and former grade in the Foreign Service of the United States and to restore to plaintiff property rights incident to his status as a Foreign Service Officer of which he was illegally deprived, and to pay to plaintiff the salary he would have earned in such employment from the date of his discharge to the date of his reinstatement.

5. That all defendants be directed to accompany their actions taken pursuant to the above prayers with a full retraction of the defamatory matters uttered and published against plaintiff and to accompany said retractions with the same, or as nearly as may be, the same public notice through the public press and otherwise as the public notices which attended plaintiff's discharge and the publication of the defamatory matter uttered by defendants.

II

Plaintiff believes that in the instant case, involving grave questions of the rights of the person, the complete denial

to plaintiff of what due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States, as well as the rights guaranteed him by the Sixth Amendment to the Constitution of the United States, as hereinabove alleged, requires that this Court take the action prayed in Part I of this prayer. However, in the event that this Court should conclude that the actions complained of in this case were taken in accordance with Executive Order 9835, as amended, and that defendants' failure, in connection with plaintiff's discharge from his employment and in connection with the unjustified defamation of his character, as alleged above, to accord plaintiff due process of law as required by the Fifth Amendment and the rights guaranteed him by the Sixth Amendment may be rectified in this Court plaintiff, in that event, prays that the discharge of plaintiff from his employment by the State Department and the findings, opinion and purported order or reversal promulgated by defendant Loyalty Review Board be reviewed by this Court and set aside as contrary to law and fact and that on such complete review, including a full judicial trial of the charge against him, this Court shall thereupon grant the relief prayed in Part I of this proper.

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III

For such other and further relief as to this Court seems proyer.

/s/ C. E. RHETTS
C. E. RHETTS
Attorney for John Stewart Service
Plaintiff

REILLY, RHETTS & RUCKELSHAUS
1401 K Street, N. W.
Washington 5, D. C.
Of Counsel

Dated: October 20, 1953.

139 Filed November 30, 1953, Harry M. Hull, Clerk

ANSWER

Defendants answer the allegations of the third amended complaint as follows:

1. Defendants deny the allegations of paragraph 1 of the third amended complaint.

2. Defendants deny the allegations of paragraph 2 of the third amended complaint.

3. Defendants deny that defendants Hiram Bingham, John Kirkland Clark, Henry L. Shattuck, George W. Alger, Bertram H. French, Harry W. Blair, John W. Amen, Bradford Bosley, Henry L. Bowden, Philip O. Coffin, Clem W. Collins, Harry W. Colmery, Edwin A. Cottrell, Marion Wade Doyle, Catherine Pratt Field, Dr. Meta Glass, Paul M. Herbert, Marshall B. Henshaw, John H. Hessey, Garrett S. Hoag, Albert E. Jenner, Jr., Willard L. King, Henry Parkman, Rollin B. Posey, Henry Reining, Jr., Murray Seasongood, Judge A. E. Steadman, Andrew Steers, C. Nils Tavares, James F. Twohy, and Eliot Wadsworth are members of Loyalty Review Board of the United States Civil Service Commission. Defendants allege that said named defendants (other than defendants Edwin A. Cottrell and Catherine Pratt Field) ceased to be members of said Loyalty Review Board on September 24, 1953, on which date said Loyalty Review Board ceased to exist, pursuant to Executive Order 10450 (April 27, 1953, 18 F.R.
140 2489). Defendants allege that defendant Edwin A. Cotfrell died in February 1953 and that defendant Catherine Pratt Field resigned as a member of the Loyalty Review Board on December 1, 1952. Defendants allege that this cause is moot as to defendant the Loyalty Review Board and as to all individual defendants sued as members thereof.

Defendants admit the remaining allegations of paragraph 3 of the third amended complaint.

4. Defendants admit the allegations of paragraph 4 of the third amended complaint.

5. Defendants admit the allegations of paragraph 5 of the third amended complaint.

6. Defendants admit the allegations of paragraph 6 of the third amended complaint.

7. Defendants admit the allegations of paragraph 7 of the third amended complaint.

8. Defendants admit the allegations of paragraph 8 of the third amended complaint. Defendants allege that in addition to said written letter of charges plaintiff, either directly or through his counsel, was given oral amplification and detailed specification of such charges by Allen B. Moreland, Legal Officer of the Loyalty Security Board of the Department of State, and by the members of said Loyalty Security Board during the course of the hearings held by said Loyalty Security Board on said charges against plaintiff.

9. Defendants admit the allegations of paragraph 9 of the third amended complaint.

10. Defendants admit the allegations of paragraph 10 of the third amended complaint.

11. Defendants admit that the findings of fact and conclusions of the Loyalty Security Board favorable to plaintiff were approved by Carlisle H. Humelsine, Deputy Undersecretary of State, pursuant to authority delegated to him by the Secretary of State.

141 12. Defendants admit the allegations of paragraph 12 of the third amended complaint. Defendants allege that a true copy of the letter dated October 11, 1951,

to plaintiff from defendant Bingham as Chairman of defendant Loyalty Review Board is set forth in paragraph 108 of the original complaint in this action, which copy is hereby incorporated by reference in this answer.

13. Defendants admit the allegations of paragraph 13 of the third amended complaint.

14. Defendants deny the allegations of paragraph 14 of the third amended complaint. Defendants allege that in addition to the written letter of charges alleged in paragraph 8 of the third amended complaint, plaintiff, either directly or through his counsel, was given oral amplification and detailed specifications of such charges by Allen B. Moreland, Legal Officer of the Loyalty Security Board of the Department of State, and by the members of said Loyalty Security Board during the course of the hearings held by said Loyalty Security Board on said charges against plaintiff.

15. Defendants admit the allegations of paragraph 15 of the third amended complaint.

16. Defendants deny the allegations of paragraph 16 of the third amended complaint. In the alternative defendants allege that the stipulation referred to in paragraph 15 of the third amended complaint constituted a waiver by plaintiff of any requirement of a notice in writing stating the charges set forth in said stipulation.

17. Defendants deny the allegations of paragraph 17 of the third amended complaint.

18. Defendants deny the allegations of paragraph 18 of the third amended complaint.

19. Defendants admit the allegations of paragraph 19 of the third amended complaint.

20. Defendants admit the allegations of paragraph 20 of the third amended complaint.

142 21. Defendants admit the allegations of the first sentence of paragraph 21 of the third amended complaint. In answer to the second sentence of paragraph 21 of the third amended complaint, defendants allege that some of the original recordings of the conversations between plaintiff and Jaffe have been destroyed but allege that others of said original recordings have not been destroyed. For lack of knowledge and information sufficient to form a belief, defendants deny the allegations of the third sentence of paragraph 21 of the third amended complaint.

22. For lack of knowledge and information sufficient to form a belief, the defendants deny the allegations of paragraph 22 of the third amended complaint.

23. For lack of knowledge and information sufficient to form a belief, the defendants deny the allegations of paragraph 23 of the third amended complaint.

24. Defendants deny the allegations of paragraph 24 of the third amended complaint.

25. Defendants deny the allegations of paragraph 25 of the third amended complaint.

26. For lack of knowledge and information sufficient to form a belief, the defendants deny the allegations of paragraph 26 of the third amended complaint.

27. Defendants deny the allegations of paragraph 27 of the third amended complaint.

28. Defendants deny the allegations of paragraph 28 of the third amended complaint.

29. Defendants admit the allegations of paragraph 29 of the third amended complaint.

143 30. For lack of knowledge and information sufficient to form a belief, defendants deny the allegations

of the first and third sentences of paragraph 30 of the third amended complaint. Defendants deny the allegations of the second sentence of paragraph 30 of the third amended complaint.

31. Defendants deny the allegations of paragraph 31 of the third amended complaint.

32. Defendants deny the allegations of paragraph 32 of the third amended complaint.

33. Defendants deny the allegations of paragraph 33 of the third amended complaint.

34. Defendants deny the allegations of paragraph 34 of the third amended complaint, except that they admit that on December 13, 1951, the Secretary of State determined to discharge plaintiff and caused a letter to be sent to plaintiff on that date terminating his employment effective at the close of business December 14, 1951.

35. Defendants admit the allegations of paragraph 35 of the third amended complaint.

36. Defendants deny the allegations of paragraph 36 of the third amended complaint, except that they admit that the Secretary of State, in determining that plaintiff's employment as a foreign service officer of the United States should be terminated, did not read the testimony taken in plaintiff's case before the Loyalty Security Board or that taken before the Loyalty Review Board.

37. Defendants deny the allegations of paragraph 37 of the third amended complaint.

38. Defendants admit the allegations of paragraph 38 of the third amended complaint.

144 39. Defendants deny the allegations of paragraph 39 of the third amended complaint.

40. Defendants deny the allegations of paragraph 40 of the third amended complaint.

41. Defendants deny the allegations of paragraph 41 of the third amended complaint.

42. Defendants deny the allegations of paragraph 42 of the third amended complaint.

43. Defendants deny the allegations of paragraph 43 of the third amended complaint.

44. Defendants deny the allegations of paragraph 44 of the third amended complaint.

45. Defendants deny the allegations of paragraph 45 of the third amended complaint.

46. Defendants deny the allegations of paragraph 46 of the third amended complaint.

ADDITIONAL DEFENSES

1. The third amended complaint fails to state a claim upon which any relief can be granted.

2. As to defendants the Loyalty Review Board and the individual defendant members thereof the case is moot.

WARREN E. BURGER
Assistant Attorney General

EDWARD H. HICKEY
Attorney, Department of Justice

DONALD B. MACGUINEAS
Attorney, Department of Justice

146 Filed July 15, 1954, Harry M. Hull, Clerk

REQUEST FOR ADMISSIONS

Plaintiff requests the defendants, and more particularly the defendants Philip Young, individually and as Chairman of the United States Civil Service Commission, Frederick Lawton and George M. Moore, individually and as members of the United States Civil Service Commission; John Foster Dulles, individually and as Secretary of State of the United States of America, within twenty (20) days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may subsequently be interposed, that each of the following statements is true:

1. With respect to the conversations between plaintiff and Philip J. Jaffe held on April 19, 20 and on May 8 and 29, 1945 in Jaffe's room in the Statler Hotel in Washington, D. C., which conversations were recorded in whole or in part, by agents of the Federal Bureau of Investigation, purported summaries or digests of all of such recordings were prepared by agents or employees of the Federal Bureau of Investigation and were furnished to the Loyalty Review Board for consideration in the determination of plaintiff's loyalty.

2. With respect to the conversations described in Paragraph 1 above, no recording or exact transcript of the text thereof was made available either to the Loyalty
147 Security Board or the Loyalty Review Board in determining plaintiff's loyalty.

3. Nothing was made available either to the Loyalty Security Board or the Loyalty Review Board, in determining plaintiff's loyalty which reflected the contents of the conversations described in Paragraph 1 above, except for (a) the purported summaries or digests mentioned above, and (b) plaintiff's own testimony.

4. No person, other than the agents or employees of the Federal Bureau of Investigation who recorded or summarized or supervised the recording or summarization of such conversations, gave any statement as to the contents of any of the above described conversations between plaintiff and Jaffe which were made available either to the Loyalty Security Board or the Loyalty Review Board in determining plaintiff's loyalty.

/s/ C. E. Rhetts
C. E. Rhetts
Attorney for Plaintiff
1120 Tower Building
Washington 5, D. C.

149 Filed Oct. 22, 1954, Harry M. Hull, Clerk

Defendants admit the truth of the statements contained in the request for admissions numbered 1 through 4 filed by plaintiff July 15, 1954.

/s/ Warren E. Burger
Warren E. Burger
Assistant Attorney General

/s/ Edward H. Hickey
Edward H. Hickey
Attorney, Department of Justice

/s/ Donald B. MacGuineas
Donald B. MacGuineas
Attorney, Department of Justice
Counsel for Defendants

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } ss:

Donald B. MacGuineas, being first duly sworn, deposes and states as follows: I am an attorney in the Department of Justice and counsel for the defendants in this action. To the best of my knowledge and belief the above Defendants' Response to Plaintiff's Request for Admission is true.

/s/ DONALD B. MACGUINEAS

Subscribed and sworn to before me this 22nd day of October, 1954.

/s/ MADELINE MACDONALD
Notary Public, D. C.

[SEAL]

My commission expires:
January 14, 1956.

151 Filed Apr. 15, 1955, Harry M. Hull, Clerk

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff moves the Court for Summary Judgment in his favor in accordance with the prayer set forth in the Third Amended Complaint, upon the basis of:

(1) the Third Amended Complaint (except for paragraphs 14, 23, 28, 30, 31, and 37 thereof);
(2) the Admissions contained in the Defendants' Answer;
(3) the Admissions filed in this Court on October 22, 1954, in response to plaintiff's request therefor;
(4) Defendants' Pre-Trial Statement, filed in this Court on February 14, 1955; and
(5) the Affidavit of plaintiff, John S. Service, attached hereto.

In support of his Motion, plaintiff states that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ C. E. RHETTS
C. E. RHETTS
Attorney for plaintiff.

152 Filed Apr. 15, 1955, Harry M. Hull, Clerk

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss:

AFFIDAVIT

I, JOHN S. SERVICE, being first duly sworn, depose and state:

1. At no time prior to my discharge by the Secretary of State from my position in the Foreign Service of the United States was I accorded or did I receive a hearing before the Board of the Foreign Service.

2. At about midday of December 13, 1951, in the office of my counsel, C. E. Rhetts, I was shown a letter dated December 13, 1951, which had been addressed to Mr. Rhetts by Hiram Bingham, Chairman of the Loyalty Review Board (attached hereto as Annex 5), advising my counsel that the Loyalty Review Board "has reversed the finding of the Loyalty Security Board of the Department of State and has found that there is a reasonable doubt as to the loyalty of John Stewart Service to the Government of the United States." Shortly thereafter, in my presence, my counsel telephoned the Deputy Undersecretary of State (Administration), Carlisle H. Humelsine, and advised him of the receipt of the above-mentioned letter from the Loyalty Review

Board and requested that the Department of State withhold any action in the premises for at least twenty-four hours, so that I might consider what action I might take in the premises, including particularly, the filing of a motion for reconsideration with the Loyalty Review Board and an appeal to the Secretary of State. My counsel sought an immediate interview with Mr. Humelsine. This was denied, but an interview was granted at about 6:00 p.m. on
153 December 13, 1951. This interview was attended by Mr. Humelsine, General Counsel Conrad E. Snow, my counsel and myself. At this time, my counsel renewed his request that any action on the basis of the Loyalty Review Board's decision be withheld until I could address further arguments to the Secretary of State in the premises, pointing out among other things that there was a serious legal question whether the Loyalty Review Board had any authority to review and reverse a decision of the State Department Loyalty Security Board and the Secretary of State which had been favorable to me. Deputy Undersecretary of State Humelsine stated, however, that the Loyalty Review Board's decision that there was a reasonable doubt of my loyalty was binding on the State Department and that it must discharge me in accordance with the decision of the Loyalty Review Board. He declined to withhold immediate action or to give me any further time in which to address any argument or plea to the Secretary of State or to any other official of the Department of State. Deputy Undersecretary Humelsine also stated that the determination to separate me from the Foreign Service had already been reached and that members of the press had been notified, some two hours earlier, that a public statement was about to be issued in connection with my case. At the same time, Mr. Humelsine handed to me an 18 page mimeographed Press Release of the Secretary of State. (Exhibit H to the Complaint.) Mr. Humelsine requested me to return to his office the following morning, December 14, 1951,

which I did and then received from Mr. Humelsine a letter addressed to me by Mr. Humelsine, dated December 13, 1951, announcing my discharge (attached hereto as Annex 1).

3. After charges were preferred against me under Executive Order 9835, they were considered at hearings held by the Loyalty Security Board of the Department of
154 State from May 26 to June 24, 1950. One copy of a stenographic transcript of these hearings was supplied to me by the Loyalty Security Board. While my hearings were continuing before the Loyalty Security Board, hearings were held by a sub-committee of the Senate Committee on Foreign Relations (herein called "Tydings Subcommittee") during the 81st Congress, 2nd Session, pursuant to S. Res. 231, "A Resolution to Investigate Whether There Are Employees in the State Department Disloyal to the United States" (herein called "Tydings Hearings"). On June 22, 23, and 26, I testified before the Tydings Subcommittee and, at its request, furnished to it my only copy of the transcript of my hearings before the Loyalty Security Board of the State Department. The full transcript of my hearings before the Loyalty Security Board of the State Department subsequently appeared at pages 1958—2509 of Part 2 of said Tydings Hearings, published by the Government Printing Office.

4. Pursuant to a letter of Notification addressed to me on October 11th by Hiram Bingham, Chairman, Loyalty Review Board (a copy of which is attached hereto as Annex 4), a hearing was held on November 8, 1951, before a panel of the Loyalty Review Board in my case. A stenographic transcript of said hearing was subsequently furnished to me. A copy of said transcript entitled "Hearing Under Regulation 14 in the Case of Mr. John Stewart Service by a Panel of the Loyalty Review Board, November 8, 1951," is attached hereto as Annex 3.

5. Subsequent to my separation from the Foreign Service, I received from Carlisle Humelsine (Deputy Undersecretary of State, a letter dated December 27, 1951, in response to an inquiry addressed to him by my counsel. A copy of this letter is attached hereto as Annex 2.

155 6. I hereby reaffirm the statement contained in the third sentence of paragraph 21 and in paragraph 24 of the Third Amended Complaint.

7. Neither the Loyalty Security Board of the State Department nor the Loyalty Review Board at any time furnished me with the original recordings of conversations between me and Jaffe which were mechanically recorded, nor did either of such Boards furnish me with any transcripts, summaries, digests, or other information concerning the contents of such conversations, except as is reflected in the transcripts of the hearings before both of said Boards.

8. Following my discharge from the Foreign Service and the publication of the opinion of the Loyalty Review Board that there was a reasonable doubt of my loyalty, I obtained employment in New York City where I am presently employed by Sarco, International, Inc. At no time since my discharge from Foreign Service have my earnings been as great as they were at the time of my discharge.

9. Prior to my discharge from the Foreign Service, I was insured by the Equitable Life Assurance Society under a group life insurance policy issued to the Foreign Service Association. Upon my discharge, all my life insurance was automatically cancelled and the Equitable Life Assurance Society refused to insure my life.

10. In August, 1952, the Equitable Life Assurance refused to accept me and my family as tenants at the Fordham Hill Apartments in New York City, solely because of the

unfavorable publicity concerning me which resulted from my discharge and the publication of the opinion of
156 the Loyalty Review Board.

/s/ JOHN S. SERVICE
JOHN S. SERVICE

Subscribed and sworn to before me this 7th day of April, 1955.

/s/ CHARLOTTE D. KIMBALL
Notary Public, D. C.

[SEAL]

My Commission expires August 14, 1958.

157 Filed Apr. 15, 1955, Harry M. Hull, Clerk

ANNEX 1

DEPARTMENT OF STATE
WASHINGTON

December 13, 1951

My dear Mr. Service:

The Secretary of State was advised today by the Chairman of the Loyalty Review Board of the U. S. Civil Service Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States. This finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of Paragraph 2 of Part V of Executive Order 9835, as amended. The Loyalty Review Board further advised that it found no evidence of membership on your part in the Communist Party or in any organizations on the Attorney General's list.

Pursuant to the foregoing, the Secretary of State, under the authority of Executive Order 9835, as amended, and

Section 103 of Public Law 188, 82nd Congress, has directed me to terminate your employment in the Foreign Service of the United States as of the close of business December 14, 1951.

In view thereof, you are advised that your employment in the Foreign Service of the United States is hereby terminated effective close of business December 14, 1951.

Sincerely yours,

For the Secretary of State:

CARLISLE H. HUMELSINE
Deputy Under Secretary

MR. JOHN S. SERVICE,
Department of State.

158 Filed Apr. 15, 1955

ANNEX 2

DEPARTMENT OF STATE
WASHINGTON

December 27, 1951

My dear Mr. Service:

Reference is made to the Department's letter to you, dated December 13, 1951, wherein you were advised that your employment in the Foreign Service of the United States was to be terminated as of the close of business December 14, 1951.

Mr. C. E. Rhetts, your attorney, called and requested that the Department clarify its letter to you, particularly with respect to the reason or reasons for the terminations of your services.

As stated in the first paragraph of the letter under reference, the Secretary was advised by the Chairman of the Loyalty Review Board of the United States Civil Service

Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States and that this finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V of Executive Order 9835, as amended. Upon receipt of the Loyalty Review Board's decision, the Secretary directed that your employment in the Foreign Service of the United States be terminated as of the close of business December 14, 1951.

In view of your attorney's request for a clarification, this is to advise that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board of the United States Civil Service Commission.

Sincerely yours,

For the Secretary of State:
CARLISLE H. HUMELSINE
Deputy Under Secretary

300 Filed Apr. 15, 1955, Harry M. Hull, Clerk

ANNEX 4

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

October 11, 1951

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. John S. Service
4608 Butterworth Place
Washington, D. C.

Dear Mr. Service:

Reference is made to the investigation in your case by the Federal Bureau of Investigation under Executive Order 9835, as amended by Executive Order 10241, which established the President's Employee Loyalty Program, and to your hearing before the Department of State Loyalty Security Board. You are advised that the Departmental Board made a determination favorable to you on the matter of loyalty and that the complete file in the case was subsequently reviewed by a panel of members of the Loyalty Review Board under authority of and pursuant to Regulation 14 of the Regulations for the Operations of the Loyalty Review Board.

Regulation 14 reads as follows:

> "The Board, or an Executive Committee of the Board, shall, as deemed necessary from time to time, cause post-audits to be made of the files on loyalty cases decided by the employing Department or Agency, or by a Regional Loyalty Board.
>
> "The Board, or an Executive Committee of the Board, or a duly constituted panel of the Board, shall have the right, in its discretion, to call up for review any determination or decision made by any Department or Agency Loyalty Board or Regional Loyalty Board, or by any head of an employing Department or Agency,

even though no appeal has been taken. Any such review shall be made by a panel of the Board, and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision, or remand the case with appropriate instructions to the Agency or Regional Loyalty Board concerned for hearing or for such further action or procedure as the panel may determine. *In exceptional cases, if in the judgment of the panel public interest requires it, the panel may hold a new hearing* in the case and after such hearing, affirm or reverse the determination or decision."

After review of the complete file, the Loyalty Review Board has determined that "public interest" requires it to hold a new hearing in your case as provided for in the above-mentioned Regulation 14.

301 The hearing before the Loyalty Review Board will be based upon the charges heretofore issued to you by the Department of State Loyalty Security Board and the issues to be heard at the hearing will be within the framework of those charges. The Loyalty Review Board will arrive at an independent judgment in this matter. The transcripts of all testimony taken below are a part of the complete file now before the Loyalty Review Board. However, you are invited to present any evidence you desire in your behalf at the hearing. You may present oral argument and you may, of course, be represented by counsel or other representative.

Arrangements will be made to hold your hearing at Washington, D. C. We are not able at this time to set a date for the hearing. However, you will be notified approximately ten days in advance of the time and hearing room address.

Loyalty Review Board
Very truly yours,
HIRAM BINGHAM
Chairman

302 Filed Apr. 15, 1955, Harry M. Hull, Clerk

ANNEX 5

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

December 13, 1951

Mr. Charles E. Rhetts
Attorney at Law
Tower Building
Washington, D. C.

Dear Mr. Rhetts:

Please be advised that the Loyalty Review Board has this day forwarded to the Department of State its opinion in the matter of John Stewart Service, which it has considered under its Regulation 14.

The Loyalty Review Board has reversed the finding of the Loyalty Security Board of the Department of State and has found that there is a reasonable doubt as to the loyalty of John Stewart Service to the Government of the United States.

Very truly yours,
HIRAM BINGHAM
Chairman
Loyalty Review Board

303 Filed May 5, 1955, Harry M. Hull, Clerk

CROSS-MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants move the Court for summary judgment on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

This motion is made on the basis of the third amended complaint, the answer, the exhibits to the original complaint, the certified copies of documents attached to this motion as Annexes 1 through 5, the Affidavit of Dean Acheson and the Affidavit of Frank W. Waikart.

/s/ WARREN E. BURGER
WARREN E. BURGER
Assistant Attorney General

/s/ EDWARD H. HICKEY
EDWARD H. HICKEY
/s/ D. B. MACGUINEAS
DONALD B. MACGUINEAS
/s/ F. CAROLYN GRAGLIA
F. CAROLYN GRAGLIA
Attorneys, Department of Justice
Attorneys for Defendants

339 Filed May 5, 1955, Harry M. Hull, Clerk

AFFIDAVIT OF DEAN ACHESON, SECRETARY OF STATE

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } *ss:*

I, Dean Acheson, Secretary of State, being duly sworn, depose as follows:

1. I am the Secretary of State and have been such since January 21, 1949.

2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Service Commission submitting to me that Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.

3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

340 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty

Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

6. Attached to this affidavit as Exhibits A and B are copies of Notice of Personnel Action (dated December 17, 1951) and Request for Personnel Action and Travel Authorization (dated December 14, 1951) issued by the
341 Department of State Division of Foreign Service Personnel which correctly reflect the action taken to terminate Mr. Service's employment.

/s/ DEAN ACHESON
DEAN ACHESON
Secretary of State

Subscribed and sworn to before me this 19th day of January, 1953.

FRANCES JEAN ESPE
Notary Public
District of Columbia

My commission expires: March 31, 1957.

342 **EXHIBIT A**

Department of State, Division of Foreign Service Personnel. Personnel Action.

Date: Dec. 17, 1951; Journal No. 1. Name: Service, John S.; Date of Birth; Aug. 3, 1909; Service FSO. This is to notify you of the following action concerning your employment, nature of action: termination. Effective date: COB, Dec. 14, 1951.

Functional title: Foreign Service Officer; post, department; class and salary: FSO-2, $11,850; appropriation allotment: 2A-5025; position number: Group 11b; nature of employment: permanent, fulltime with retirement deduc-

tions; sex: male; marital status: married; children and dependents: three.

Conditions and requirements: Above action and continuance of status effected thereby are subject to such conditions and requirements listed on reverse of this page as are cited herewith.

Remarks: Pursuant to the decision of the Loyalty Review Board of December 13, 1951. Termination authority Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress. Lump-sum payment is hereby authorized for 132 days cumulative and 46 days current annual leave. Payment to be made by the Department. Address: 4608 Butterworth Place, N.W., Washington 16, D. C.

(Signature); Title: Chief, Div. of For. Ser. Personnel.

344 **EXHIBIT B**

Department of State for service United States of America.

Request for P rsonnel Action and Travel Authorization.

Post, Department; Date, Dec. 14, 1951; Married; Male; SERVICE, John S., Aug. 3, 1909; nature of action, termination; effective date 12-14-51; funtional title, Foreign Service Officer; FSO-2—$11,850; post, department; appropriation allotment, 2A-5025; 349 drafted 12-17-51; position number, Group IIB; nature of employment, permanent; retirement deduction, yes.

Added by leave section 12-14-51; lump-sum payment is hereby authorized for 132 days cumulative and 46 days current annual leave. Payment to be made by the Department. Address: 4608 Butterworth Place, N.W., Washington 16, D. C., /s/ Mary L. Mayhew, Acting Chief, Leave & Retirement Unit.

Additional information and instructions—Pursuant to the decision of the Loyalty Review Board of December 13,

1951. Termination authority Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress. (wife: dau. Virginia b. 7-3-35; son Robert b. 2-17-37; son Philip b. 8-6-45); Singnature of requesting officer, /s/ Ernesto Colantonio, title PER:FP: Ernesto Colantonio; Signature of approving officer, /s/ Howard P. Mace, Chief, Field Operations Branch, Division of Foreign Service Personnel.

Request for travel authorization (not as traveler's request nor for his convenience): from Washington, D. C. to Berkeley, California; purpose of travel and special travel instruction, travel and shipment of effects authorized from Washington, D. C. to Berkeley, California.

350 Filed Jun 30, 1955, Harry M. Hull, Clerk

JOHN S. SERVICE, *Plaintiff*,

v.

HIRAM BINGHAM, ET AL., *Defendants*.

Civil Action No. 4967-52

MEMORANDUM

On September 24, 1953, pursuant to Executive Order 10450, the Loyalty Review Board of the Civil Service Commission ceased to exist and the defendants who had been members of the Loyalty Review Board were retired from their positions. Defendants contend, and plaintiff concedes, that suits against public officials abate upon their retirement from public office. As to those defendants, who were former members of the Loyalty Review Board of the Civil Service Commission, the case is dismissed.

The action of the Loyalty Review Board of the United States Civil Service Commission in this instance is a nullity. As the Supreme Court held in the Peters case, the Board's power of review was limited to "persons recommended for

dismissal on grounds relating to loyalty by the loyalty board of any department or agency."

Petitioner was given hearings before the Loyalty Security Board of the State Department, which Board determined that there was no reasonable doubt as to his loyalty. Under the guise of a "post-audit review" the Loyalty Review Board of the Civil Service Commission took jurisdiction to re-determine the findings of the Loyalty Security Board of the State Department. The action of this Loyalty Review Board being a nullity, the Civil Service Commission is directed to expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to plaintiff's loyalty to the United States.

In the Peters case the Loyalty Review Board issued an order debarring the petitioner from future government employment, whereas in the instant case the Board did
351 not issue an order but rendered an opinion based on its findings to the Secretary of State, which opinion, at its best, was merely advisory in that the Secretary was not bound to follow it.

It is now claimed by the plaintiff that since the Secretary's decision was based upon an invalid opinion, the determination made by the Secretary to terminate his services is likewise invalid. On the surface this reasoning would be convincing if it were not for the fact that the power the Congress bestowed on the Secretary of State by Public Law 188 was that of "absolute discretion."

Since 1947 Congress has enacted a rider to each Appropriation Act for the State Department, authorizing the Secretary of State to summarily dismiss officers and employees of that Department. The provision in force on the date of plaintiff's discharge provided as follows:

> "Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555) or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, ter-

minate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interest of the Unitd States."

The notice of plaintiff's termination states that such action was taken pursuant to the aforementioned public law, as well as pursuant to Executive Order 9835, as amended. The former Secretary of State, in support of defendants' motion for summary judgment, states that he exercised his own discretion in determining to terminate plaintiff's employment under the authority vested in him by the aforementioned rider, Public Law 188. In his affidavit he states:

". . . In determining to terminate the employment of Mr. Service I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did exercise that judgment."

352 This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to determining whether any procedural requirement of the statue was violated in plaintiff's discharge.

Under Public Law 188 there was one procedural requirement: that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States. That determination the former Secretary of State made.

Plaintiff's contention that by virtue of the State Department's regulations he could not be dismissed under Public

Law 188 unless the procedures prescribed by Executive Order 9835 were followed is without merit. It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 18. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.

Under Public Law 188 plaintiff could have been summarily dismissed without notice of charges, hearing, or appeal. Plaintiff was advised of the documents which were found in Mr. Jaffe's possession and was permitted to examine the photostats of those documents so that he could identify those documents, copies of which he had loaned to Mr. Jaffe. He was given an exhaustive hearing before the Department of State Loyalty Security Board and presented a number of witnesses, affidavits, and statements. Plaintiff does not deny that he loaned certain documents to Mr. Jaffe.

While the Secretary of State could not terminate plaintiff's service because the Loyalty Review Board of the Civil Service Commission found that there was a reasonable doubt as to plaintiff's loyalty to the United States, nevertheless he could terminate his services if he deemed such termination necessary or advisable in the interests of the United States, and this is so even though the finding and opinion of the Loyalty Review Board of the Civil Service Commission is a nullity.

353 Accordingly plaintiff was validly discharged under Public Law 188 and defendants' cross motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. Counsel for the defendants will prepare the appropriate order.

/s/ EDWARD M. CURRAN
Judge

June 30, 1955

354 Filed Jul 28, 1955, Harry M. Hull, Clerk

Docketed 7/28.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Service Action No. 4967-52
JOHN S. SERVICE, *Plaintiff*,

v.

HIRAM BINGHAM, et al., *Defendants*.

ORDER

This cause having come on for hearing on the motion of the plaintiff for summary judgment and on the cross-motion of defendants for summary judgment, and it appearing that plaintiff was validly discharged pursuant to the provisions of Public Law 188, 65 Stat. 575, 581, but that the finding of the Loyalty Review Board that there is a reasonable doubt as to plaintiff's loyalty was beyond the Board's jurisdiction, in accordance with the Memorandum of the Court, filed June 30, 1955, it is this 26th day of July 1955.

ADJUDGED, ORDERED and DECREED that:

1. This case is dismissed as moot as to defendants Hiram Bingham, John Kirkland Clark, Henry L. Shattuck, George W. Alger, Bertram Lfl French, Harry W. Blain, John H. Amen, Bradford Bosley, Henry L. Bowden, Philip O. Coffin, Clem W. Collins, Harry W. Colmery, Edwin A. Cottrell, Marion Wade Doyle, Catherine Pratt Field, Dr. Meta Glass, Paul M. Herbert, Marshall B. Henshaw, John H. Hessey, Garrett S. Hoag, Albert E. Jenner, Jr., Willard L. King, Henry Parkman, Rollin B. Posey, Henry Reining, Jr., Murray Seasongood, Judge A. E. Steadman, Andrew Steers, C. Nils Tavares, James F. Twohy, and Eliot Wadsworth,

who were former members of the Loyalty Review Board of the Civil Service Commission.

355 2. The Civil Service Commission shall expunge from its records the Loyalty Review Board's finding that theer is a reasonable doubt as to plaintiff's loyalty to the United States.

3. Defendants' cross-motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

/s/ EDWARD M. CURRAN
United States District Judge

July 26, 1955

Consented to as to form:

REILLY, RHETTS & RUCKELHAUS
Attorneys for Plaintiff

By: GERARD D. REILLY

357 Filed July 28, 1955, Harry M. Hull, Clerk

PLTF'S EXHIBIT "10"

COPY

Filed Sep. 23, 1955, Harry M. Hull, Clerk

THE WHITE HOUSE
WASHINGTON
September 6, 1950

My dear Mr. Secretary:

I have appproved H.R. 7786, the "General Appropriation Act, 1951". Section 1213 of the Act provides that "notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any

other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever h shall deem such termination necessary or advisable in the interests of the United States."

I am sure you will agree that in exercising the discretion conferred upon you by Section 1213s, every effort should be made to protect the national security without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.

In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying ou the provisions of section 1213 of the General Appropriations Act.

Sincerely yours,

/s/ HARRY TRUMAN

The Honorable
The Secretary of State

[Fol. 92] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,958

JOHN S. SERVICE, Appellant

v.

JOHN FOSTER DULLES, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Mr. C. E. Rhetts for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Mr. Paul A. Sweeney,* Attorney, Department of Justice, was on the brief, for appellees.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

OPINION—June 14, 1956

BASTIAN, *Circuit Judge:* This is an appeal from a judgment granting defendants' (appellees') motion for summary judgment.

Plaintiff (appellant) was formerly a Foreign Service officer, who was dismissed by action of former Secretary of State Acheson. Appellees are the present Secretary of State, members of the Civil Service Commission, and the former members of the Loyalty Review Board of the Civil Service Commission, established by Executive Order No. 9835.

Appellant filed this suit to obtain a judgment declaring his discharge void and invalid; to obtain reinstatement to his employment and his salary from the date of his [fol. 93] discharge to the date of his reinstatement; for the expunging from the record of statements reflecting that this dismissal had been on the ground that there was or is reasonable doubt as to his loyalty to the Government of the United States; and for certain other relief. On cross-motions for summary judgment, the District Court

dismissed the case as moot as to the former members of the Loyalty Review Board of the Civil Service Commission as that Board had ceased to exist and, as to them, the action had abated; directed the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that there was reasonable doubt as to appellant's loyalty to the Government of the United States; granted appellees' cross-motion for summary judgment and denied appellant's motion for summary judgment.

The record discloses that under date of March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State notified appellant that a hearing had been scheduled under § 395 of the Regulations and Procedures of the Department of State to consider charges against him "with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State Appropriation Act, 1950, Section 104 Public Law 179, 81st Congress, First Session,[1] your [his] employment in the Department should be terminated in the interest of the United States." The letter [fol. 94] setting forth the notification of charges read in part as follows:

> "Under date of March 21, 1947, the President issued Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program in the Executive Branch of the Government. Under date of March 11, 1949, the Department of State promulgated regulations and procedures, a copy of which is attached, setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State.

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[1] Public Law 179, Sec. 104, provides as follows: "Sec. 104. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. (63 Stat. 456.)

"In the course of investigations conducted pursuant to this loyalty and security program certain information has been received by the Department of State, which, after initial consideration by the Loyalty Security Board of the Department of State, necessitates the formulation of a charge against you. . . ."

The specific charges were appellant's disloyalty to the United States and the claim that he was a security risk.

Following extensive hearings, the State Department Loyalty Board concluded that reasonable grounds did not exist for believing that appellant was disloyal to the United States and that he did not constitute a security risk to the Department of State. This was approved by the Deputy Under Secretary of State.

After the issuance of Executive Order No. 10241, amending the standard established by Executive Order No. 9835 for removal from employment on loyalty grounds, the Loyalty Security Board of the Department of State again considered appellant's case and determined that, under Executive Order No. 10241, no reasonable doubt existed as to appellant's loyalty to the United States. This decision likewise was approved by the Deputy Under Secretary of State.

Thereafter, the Loyalty Review Board of the Civil Service Commission advised appellant that it would hold a new hearing based on the charges filed by the Department of State Loyalty Security Board; and, after intermediate proceedings, the Civil Service Commission Loyalty Review [fol. 95] Board rendered its opinion, holding that there was reasonable doubt about appellant's loyalty. The action subsequently taken by Secretary Acheson appears from his affidavit filed in the District Court, as follows:

"3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

"4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

"5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before these boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review [fol. 96] Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment. . . . "

The Supreme Court, in *Peters* v. *Hobby*, 349 U. S. 331 (1955), held that the power of the Loyalty Review Board of the Civil Service Commission was limited to "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any department or agency." Accordingly, the District Court held that the decision of the Loyalty Review Board was a nullity in a case where (like

the present one) no such recommendation for dismissal had been made.

The appellant argues that the discharge was unlawful because the Secretary's action must be sustainable on the grounds which he invoked to support it; further, "by relying 'solely' on the invalid finding of the Loyalty Review Board and failing to make an independent determination on all the evidence and by denying appellant an opportunity to appeal to him, the Secretary violated his own regulations prescribing the manner in which he would exercise his McCarran Rider [2] authority and thereby denied appellant the procedural and substantive guarantees of these regulations." It is also argued that the Secretary "exercised his discretion under the McCarran Rider, if at all, in an arbitrary and illegal manner in that he misapprehended the legal validity of the Loyalty Review Board finding on which he relied 'solely' and in that he failed to make an independent determination of his own that appellant's discharge was necessary or advisable in the interests of the United States."

Beginning in 1947 and continuing through the time covered by appellant's dismissal, Congress had enacted [fol. 97] riders, all similar to Section 104, Public Law 179, quoted in note 1, *supra*, to the several appropriations acts covering the State Department, authorizing the Secretary of State to summarily dismiss officers and employees of that department "whenever he shall deem such termination necessary or advisable in the interests of the United States." [3]

The notice of termination of appellant's employment stated that such action was taken pursuant to the above quoted provision for summary dismissal *as well as* under Executive Order No. 9835, as amended by Executive Or-

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[2] The term "McCarran Rider" has reference to Sec. 104, Public Law 179, note 1, *supra*, and similar subsequent enactments.

[3] We recently held a similar statute to be constitutional in the case of *Scher* v. *Weeks*, Secretary of Commerce, decided January 19, 1956, — U. S. App. D. C. —, 231 F. 2d 494, cert. denied, June 4, 1956, — U. S. —.

der No. 10241. The Secretary of State, in his affidavit filed in the District Court, stated that his action was taken under Executive Order No. 9835, as amended by Executive Order No. 10241, *and also* under Section 103 of Public Law 188, 82d Congress (the same provision as Section 104 of Public Law 179, 81st Congress, note 1, *supra.*)

As well expressed by Judge Curran, of the District Court:

> "This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to determining whether any procedural requirement of the statute was violated in plaintiff's discharge.
>
> "Under Public Law 188 there was one procedural requirement, that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States. That determination the former Secretary of State made.
>
> "Plaintiff's contention that by virtue of the State Department's regulations he could not be dismissed under Public Law 188 unless the procedures prescribed by Executive Order 9835 were followed is [fol. 98] without merit. It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.
>
> "Under Public Law 188 plaintiff could have been summarily dismissed without notice of charges, hearing, or appeal."

The District Court then concluded that appellant was validly discharged under Public Law 188. Under the circumstances of this case, we must agree.

We also think that the District Court was entirely correct in directing the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that

there was reasonable doubt as to appellant's loyalty to the United States as, under the *Peters* case, *supra*, the action of that Board was a nullity.[4]

The judgment of the District Court is
Affirmed.

[fols. 99-101] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. 4967-52

JOHN S. SERVICE, Appellant,

v.

JOHN FOSTER DULLES, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before: Wilbur K. Miller, Washington and Bastian, Circuit Judges

JUDGMENT—June 14, 1956

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 14, 1956.

Per Circuit Judge Bastian.

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[4] It is only fair to add that since the finding of the Review Board is a nullity, and since appellant's discharge is sustained only under Public Law 188, the following quotation from note 2 in *Scher* v. *Weeks*, supra, would seem equally applicable in this case: "It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk."

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 407

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3101-3)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE,

Petitioner,

v.

JOHN FOSTER DULLES, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. E. RHETTS,
Salem, Indiana
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734 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioner.

September 1956

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No.

JOHN S. SERVICE,

Petitioner,

v.

JOHN FOSTER DULLES, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, John S. Service, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the Loyalty Security Board of the Department of State is printed at R. 12-29.[1] The opinion of the Loyalty Review Board is printed at R. 1-11. The opinion

[1] References to the record "(R. —)" are to the Joint Appendix as printed in the court below (R. 1-91). The certified transcript contains also the proceedings in the Court of Appeals (R. 92-102).

of the District Court is unreported and is printed at R. 85-88. The opinion of the Court of Appeals (R. 92-98) is not yet reported and is printed as Appendix B to this petition, *infra*, pp. 66-72.

Jurisdiction

The judgment of the Court of Appeals was entered June 14, 1956 (R. 99). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Secretary of State can validly exercise his statutory discretion to discharge petitioner by acting solely on the findings and opinion of the Loyalty Review Board in a case where the Board had no jurisdiction and where the Board's procedures in critical respects violated both the Fifth Amendment and the Executive Order under which it purported to act.

2. Whether the Secretary of State can validly exercise his statutory discretion to discharge government employees in the interest of the United States without following the procedures prescribed for such action by his own regulations.

Statutes, Regulations and Constitutional Provisions Involved

This case involves:

(1) The Fifth Amendment to the Constitution of the United States printed in Appendix A, *infra* p. 24.

(2) The so-called McCarran Rider to various State Department Appropriation Acts (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768), printed in Appendix A, *infra* p. 24.

(3) Executive Order 9835 (12 Fed. Reg. 1935) printed in Appendix A, *infra* p. 25, as amended by Executive Order 10241 (16 Fed. Reg. 3690) printed in Appendix A, *infra* p. 33.

(4) Department of State Regulations and Procedures relating to Loyalty and Security of Employees, (a) as adopted March 11, 1949, printed in Appendix A, *infra* p. 33, and (b) as revised May 4, 1951 and September 21, 1951, printed in Appendix A, *infra* p. 46.

Statement of the Case

The case comes to this Court from the affirmance of a judgment in the trial court which granted part of the relief sought by the petitioner but denied his motion for summary judgment and granted respondents' cross-motion. Neither party introduced testimony in the trial court. Save for such reference to the transcript of hearing before the Department of State Loyalty Security Board as is necessary to explain how this case arose,[2] the statement which follows is therefore based on the facts pleaded in the third amended complaint (R. 40) and admitted in the answer (R. 62), the admissions of respondents (R. 68), the affidavit of petitioner accompanying his motion for summary judgment (R. 71), and the affidavit of the former Secretary of State accompanying the respondents' cross-motion (R. 81).

From October 1935, until December 14, 1951, petitioner served continuously as a Foreign Service Officer of the United States, advancing by promotion to Class 2 of the Foreign Service (R. 41, 63). All of his service as a Foreign Service Officer between 1935 and 1945 was in China. He was rated by Ambassador Gauss, the last Ambassador under whom he served in China, as "one of the ablest and most promising younger officers of the China corps and the serv-

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[2] The transcript of hearing before the departmental Loyalty Security Board is printed in the Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 81st Cong., 2d Sess., pursuant to S. Res. 231, pp. 1958-2509, hereinafter referred to as the "Tydings Committee Hearings."

ice in general."[3] From 1943 to 1945 he was assigned to duty as a political reporter with the United States Army in China and in 1944 and 1945 was sent as an observer for the Army to Chinese Communist Army headquarters in Yenan.[4] The Loyalty Security Board of the Department of State found petitioner's reports to be "objective, and extraordinarily accurate as political forecasts of what was to come" (R. 16). It was a part of petitioner's duties while assigned to the Army to supply background material to American newspapermen in China, including, in his discretion, material from his own reports.[5]

In April 1945, on termination of his Army assignment and shortly after his return to the United States, petitioner lent a few of his personal copies of his reports to one Philip Jaffe, editor of Amerasia magazine; those selected by Service, according to the State Department Loyalty Security Board, "contained nothing that could be considered harmful to the national security" (R. 25). Jaffe at the time was under close surveillance by the F. B. I. (R. 21). In June 1945 petitioner, Jaffe, and four others were arrested by the F. B. I. on warrants charging conspiracy to violate the Espionage Act. Petitioner appeared and testified before a federal grand jury in August 1945, and the jury thereafter voted unanimously not to indict him.[6]

From the time of his arrest, petitioner had been on leave of absence with pay. When the grand jury found no basis for an indictment against him, Secretary of State Byrnes, acting on the recommendation of the Foreign Service Personnel Board, on August 14, 1945, restored him to active duty; he predicted "a continuance of the splendid record I am advised you have maintained since first you entered

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[3] Tydings Committee Hearings, p. 2067.
[4] *Ibid.*, pp. 1962-1974.
[5] *Ibid.*, pp. 2005-2006, 2095-2098; R. 24.
[6] *Ibid.*, pp. 2234-2237, 2290, 2347.

the Foreign Service"[6], while Under Secretary Grew on the same day wrote his pleasure that petitioner was returning to Far Eastern duty "where you have established an enviable record for integrity and ability."[7] In May 1948 petitioner was promoted to Class 2 in the Foreign Service.[8]

The Department of State reviewed petitioner's case a number of times over the next five years, and cleared him in 1945, 1946, 1947 and 1949.[9] In early 1950 the favorable decision of the Department Loyalty Security Board in 1949 was under "post-audit" review by the Loyalty Review Board (R. 1, 33). On January 5 and February 20, 1950, petitioner was attacked on the Senate floor.[10] On March 3, 1950, a panel of the Loyalty Review Board acting on "post-audit" recommended that petitioner's case be "remanded" to the Department. The accusing Senator so advised the Tydings Committee on the morning of March 14, 1950.[11] By letter dated March 14, 1950, the Loyalty Review Board directed the Department of State Loyalty Security Board to reconsider petitioner's case and to hold a hearing on charges (R. 12). On March 16, 1950, petitioner, who was then aboard ship en route to his assignment as Officer in Charge at Calcutta, was directed to return to Washington.[12]

On March 24, 1950, the Chairman of the Department of State Loyalty Security Board sent to petitioner a letter of charges. This letter (R. 28) referred to the 1950 McCarran Rider, authorizing the Secretary of State "in his absolute discretion" to discharge any employee in the Department "whenever he shall deem such termination necessary or advisable in the interests of the United States," to Executive

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[7] *Ibid.*, pp. 2347-2348.

[8] *Ibid.*, p. 2385.

[9] Testimony in February 1949 before House Sub-Committee on Appropriations, Hearings. 81st Cong., 1st Sess., p. 298.

[10] Tydings Committee Hearings, p. 1902; 96 Cong. Rec. 1956.

[11] *Ibid.*, p. 131.

[12] *Ibid.*, p. 1905.

Order 9835, and to the Department's Regulations and Procedures of March 11, 1949, relating to Loyalty and Security of Employees, a copy of which was enclosed. The letter stated that the charges were based on Sections 392.2(f) [suspect associations as evidence of disloyalty] and 393.1(d) [suspect associations as evidence of security risk] of said Regulations and Procedures. It advised that a hearing would be held on these charges to determine whether petitioner's employment should be terminated in the interests of the United States.

After 15 days of hearings, the Loyalty Security Board on October 24, 1950, found (a) that petitioner was neither disloyal nor insubordinate in his relations to former Ambassador Hurley; and (b) that, although petitioner had been indiscreet in lending his reports to Jaffe, the circumstances of these disclosures contained no evidence of disloyalty, and that the experience suffered by petitioner as a consequence of this indiscretion "has served to make him far more than normally security conscious." Accordingly, the Board concluded (1) that reasonable grounds did not exist for the belief that petitioner was disloyal to the United States and (2) that petitioner did not constitute a security risk (R. 14-28). These findings and conclusions of the Loyalty Security Board were approved by the Deputy Under Secretary of State (Administration) pursuant to authority delegated to him by the Secretary of State (R. 42-43, 63).

The Loyalty Review Board, again acting by way of "post-audit," returned the case to the Department of State (R. 33). Executive Order 10241 was issued on April 28, 1951, to amend the loyalty standard previously established by Executive Order 9835. The departmental Loyalty Security Board again considered petitioner's case, under the new and stricter standard, and on July 31, 1951, determined that "no reasonable doubt exists as to his loyalty to the United States" (R. 42, 63). These findings and conclusions of the

Loyalty Security Board were also approved by the Deputy Under Secretary of State (Administration) (R. 42-43, 63).

By letter of October 11, 1951 (R. 78) the Loyalty Review Board of the Civil Service Commission advised petitioner that it had again conducted a "post-audit" of his case pursuant to Regulation 14 of the Loyalty Review Board,[13] and had determined that the Loyalty Review Board would itself conduct a new hearing "upon the charges heretofore issued to you by the Department of State Loyalty Security Board." A hearing was held before a panel of the Loyalty Review Board on November 8, 1951. Since the Loyalty Review Board admittedly had no jurisdiction over matters of security, this hearing was confined to the question of petitioner's loyalty. In addition to interrogating petitioner about the lending of his reports to Jaffe, the Review Board panel had before it, but would not allow petitioner to see, summaries or digests supplied by the F. B. I. of recordings made by the F. B. I. of conversations between petitioner and Jaffe (R. 74). On December 12, 1950, the Loyalty Review Board panel issued an opinion finding (a) that there was no evidence of communist affiliations, but (b) that petitioner had lent some of his reports to Jaffe and in his conversations with Jaffe had disclosed other information which the Board considered confidential; from this it concluded that there was a reasonable doubt as to petitioner's loyalty, and directed that the favorable finding of the departmental Loyalty Security Board be "reversed" (R. 1-11).

On December 13, 1951, the Chairman of the Loyalty Review Board directed a letter to the Secretary of State transmitting the opinion of the panel, reciting the Loyalty Review Board's "opinion" that petitioner should forthwith

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[13] Regulation 14 as it then read (13 Fed. Reg. 255, as amended 13 Fed. Reg. 9366) is set out in the Board's letter (R. 78-79). It was later amended (17 Fed. Reg. 631) to read as set out in *Peters v. Hobby*, 349 U. S. 331, 341, 342 (1955).

be removed from service, and concluding: "Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service" (R. 33-35). On the same day, petitioner's attorney was advised by letter from the Chairman of the Loyalty Review Board that the Board had "reversed" the finding of the departmental Loyalty Review Board (R. 80). Petitioner and his attorney immediately sought and at about 6:00 P. M. that same day obtained an interview with the Deputy Under Secretary of State (Administration). Petitioner requested that any action be withheld at least for twenty-four hours until he could address an appeal to the Secretary of State or a request for reconsideration to the Loyalty Review Board. The Deputy Under Secretary declined to withhold immediate action, stating that the determination to separate petitioner from the Foreign Service had already been reached, that the decision of the Loyalty Review Board was binding on the State Department, and that members of the press had been notified some two hours earlier that a public statement was about to be issued on the case (R. 72). This notice was given the press within four hours after receipt of the Loyalty Review Board opinion within the Department (R. 50, 66, 72). At the same time the Deputy Under Secretary gave petitioner a copy of a press release, which was issued by the Secretary of State later on December 13. That press release (R. 35-37) said in part:

> The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. Those Regulations are binding on the Department of State.

> The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

At this time the Regulations of the Loyalty Review Board (13 Fed. Reg. 9372; 5 CFR Section 220.4(d)) provided: "It is necessary that the head of an agency follow the recommendation of the Loyalty Review Board in all cases." The 1949 Department of State Regulations and Procedures relating to Loyalty and Security of Employees provided in Section 391.2 that the Regulations of the Loyalty Review Board "constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State." They also provided in Section 396.4: "If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the loyalty standard referred to in Sec. 392, the Department will take prompt administrative action to remove him from employment." The revised Department Regulations and Procedures of 1951, which have never been published and of which petitioner was unaware until this proceeding reached the courts, contain the same provision with slight modification.[14]

On December 14, 1951, petitioner received a letter from the Deputy Under Secretary (Administration), dated December 13, advising him that the Loyalty Review Board had found, as a consequence of his unauthorized disclosure of documents and information, that there was a reasonable doubt as to his loyalty, and that pursuant to that finding

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[14] Section 396.4 of the 1951 regulations is made applicable to adverse loyalty determinations by the Loyalty Review Board "on appeal." But neither the 1949 nor the 1951 regulations of the Department of State make any express provision for disposition of cases following the Review Board's unlawful "post-audit."

his employment was terminated as of the close of business December 14, 1951, "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress" [the then-current McCarran Rider] (R. 75). The Department's Notice of Personnel Action, dated December 17, 1951, states that the terminating action was taken "pursuant to the decision of the Loyalty Review Board," and cites as "termination authority" Executive Order 9835 and the McCarran Rider (R. 84). Petitioner thereafter sought clarification of the reason for termination of his services and on December 27, 1951, was advised by letter from the Deputy Under Secretary "that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board" (R. 76).

Petitioner after vain efforts to obtain reconsideration by the Loyalty Review Board and the Civil Service Commission [15] instituted the present action. His third amended complaint asked for a declaratory judgment that his separation from service was invalid, that all defendants be directed to expunge from their records all written statements reflecting that petitioner's employment had been terminated on the ground that there was a reasonable doubt as to his loyalty to the United States, and that the Secretary of State be directed to reinstate petitioner to his employment and former grade in the Foreign Service with full restoration of property rights and payment of accumulated salary (R. 59-61). Following the Government's answer, both parties filed motions for summary judgment (R. 70, 80). To the Government's motion was attached the affidavit of the

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[15] The complaint alleges and the answer admits that petitioner "has in every respect exhausted every administrative remedy available to him" (R. 51, 66). The motion to vacate and reconsider was filed with the Loyalty Review Board on December 20 and denied on January 7, 1952; it urged the Board's lack of authority to reverse a favorable Departmental decision. Exs. J and K to complaint. The request for review by the Civil Service Commission was filed January 7 and denied April 1, 1952 (R. 38).

former Secretary of State (R. 81); it was dated January 19, 1953, and said in material part:

> 3. On that same day [December 13, 1951] I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.
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> 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.
>
> 5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before these boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In deter-

mining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

6. Attached to this affidavit * * * are copies of Notice of Personnel Action * * * which correctly reflect the action taken to terminate Mr. Service's employment.

One day before this case was argued in the District Court, this Court in *Peters* v. *Hobby*, 349 U. S. 331, held invalid Regulation 14 of the Loyalty Review Board, a decision of a panel of the Board thereunder following a "post-audit" hearing, and a decision of a department head based on the Review Board's decision, on the ground that the reviewing authority of the Loyalty Review Board was confined by Executive Order 9835 to cases of "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any Department or Agency."

On authority of the *Peters* case, the District Court declared the action of the Loyalty Review Board a "nullity" and directed the Civil Service Commission to expunge from its records the Board's finding that there was a reasonable doubt as to petitioner's loyalty. But with respect to the other relief sought by petitioner, the District Court granted summary judgment for respondents (R. 89). The Court of Appeals affirmed (R. 92).

Reasons for Granting the Writ

The Court of Appeals has held: (a) that the Loyalty Review Board, acting in a lawless assumption of jurisdic-

tion and upon tainted evidence, can supply the sole basis for a lawful exercise of discretion by the Secretary of State; and (b) that the Secretary of State is free completely to disregard both his own procedural regulations and the Department's representations to petitioner as to the manner in which his discretion is to be exercised.

The result is a decision in conflict with *Peters* v. *Hobby*, 349 U. S. 331, and with the cases in this Court and in the Courts of Appeals which since *Perkins* v. *Elg*, 307 U. S. 325, have held that executive discretion must be exercised in accordance with law and in accordance with the agency's own regulations.

Our reasons in detail are:

1. *The Loyalty Review Board Opinion was Lawless.* It is indisputable that petitioner could not lawfully be discharged on the basis of the findings and opinion of the Loyalty Review Board. These were entered on a "post-audit" and hearing, each conducted on the Board's own motion, after a favorable decision by the Department. This conduct was "administrative lawlessness." *Peters* v. *Hobby, supra*, 345.[16]

The Board, moreover, rested its decision chiefly upon summaries of four intercepted conversations between peti-

[16] The suggestion in *Peters* (p. 345) was that the President might have withheld post-audit jurisdiction from the Loyalty Review Board so that the employee would be "assured that his fate would not be decided by political appointees who perhaps might be more vulnerable to the pressures of heated public opinion." The Loyalty Review Board here directed the Department to issue charges against petitioner shortly after petitioner had been denounced on the Senate floor: the accusing Senator seems to have had advance knowledge of this directive (*supra*, p. 5); and a transcript of the Board's minutes of February 14, 1951, as read on the Senate floor, shows that in the period of its remand of petitioner's case to the Department of State the Board was expressing great concern that the State Department Loyalty Security Board had not recommended the discharge of enough employees; "the program simply does not work in that Department" (98 Cong. Rec. 192-193).

tioner and Jaffe, and denied to petitioner any information as to their content (R. 4, 5, 6, 8, 10, 11). The transcript of the one conversation ever made available to petitioner (in a Congressional hearing) shows on its face that it is incomplete and in substantial part unintelligible.[17] There is no conceivable reason of security why an accused cannot know and explain what he is supposed to have said. There is every reason of rudimentary fairness why this purported evidence should be made available to him. Reliance on this sort of secret evidence violates both the Fifth Amendment to the Constitution and Executive Order No. 9835 itself, *infra*, p. 28.

2. *The Secretary Relied Solely Upon the Lawless Findings and Opinion.* The contemporaneous evidence was unmistakable that petitioner was discharged in automatic consequence of this unlawful action of the Loyalty Review Board. That Board said that it "reversed" the departmental Board; it requested of the Secretary advice "of the effective date of removal of said employee;" its regulations provided "It is necessary that the head of an agency follow the recommendations of the Loyalty Review Board in all cases;" the Department's own regulation advised that upon adverse decision of the Loyalty Review Board "the Department will take prompt administrative action to remove" the employee; its Deputy Under Secretary advised peti-

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[17] Tydings Committee Hearings, 1404. The stenographer described one passage as "(unintelligible)", added a word in a vain effort to make one sentence intelligible, inserted his own doubts by "(?)", put in a reference to "Petroff (ph) the new Soviet Ambassador" when no known Soviet Ambassador to China or America has had a remotely similar name, and attributed to petitioner a quotation from an unknown "Award (ph)." He has Service relaying the astounding information (contradicted in the very conversation) that "Hurley's fighting Chungking." The Loyalty Review Board mangles this tapped conversation still further by translating "military plans" into troop dispositions (R. 8) when in context the "plans" related only to political recognition by the military of both Chiang Kai-Chek and the Communists.

tioner orally that under the Loyalty Review Board action the Department was "required" to remove petition, and by letter that "Your employment was terminated solely as a result of the above mentioned finding of the Loyalty Review Board;" the Secretary's press release said the Loyalty Review Board regulations "are binding on the Department;" and the formal personnel action, said by the Secretary in his affidavit to be correct, described petitioner's removal as "pursuant to the decision of the Loyalty Review Board" (*supra*, pp. 8-10).

It developed only when the former Secretary's affidavit was filed in this action, some 14 months later, that he himself had in this respect a sounder knowledge of his responsibilities than did his Department. That affidavit explains that he recognized at the time that the responsibility of decision was vested in him and that he was not legally bound by the opinion of the Loyalty Review Board[18] (*supra*, pp. 11-12). The respondents, however, are not aided, for the former Secretary, with commendable candor goes on to say—

> 5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would

[18] The Court of Appeals for the District of Columbia so held on October 16, 1952. *Kutcher* v. *Gray*, 199 F. 2d 783.

make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board.

In *Peters*, the majority of this Court assumed that the Secretary acted on the basis of the unlawful opinion of the Loyalty Review Board (349 U. S. at 337, 348); the dissenting Justices found nothing to show that this opinion was treated by the Secretary as anything more than recommendation (349 U. S. at 356). Here there is no such ambiguity. The Court in this case, as it did not in *Peters*, has the Secretary's affidavit that he considered himself free to disregard the Loyalty Review Board decision. But it also knows from that affidavit, as it did not in *Peters*, that the Secretary based his action *solely* on that unlawful decision. His affidavit makes it plain that, had he known the decision of the Loyalty Review Board to be a nullity, he would have had nothing at all to support his removal of petitioner; this is most simply tested by reading paragraph 5 of the affidavit with the descriptive word "invalid" or "unlawful" inserted before each reference to the finding or opinion of the Loyalty Review Board.

If we put aside the Secretary's violation of his procedural regulations (*infra*, p. 17), the case is this: The Secretary took discretionary action but based it solely upon findings and an opinion of the Loyalty Review Board which represented a lawless assumption of jurisdiction and rested in chief part upon an unlawful use of secret and grossly unreliable evidence.

Executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the courts below. In *Perkins* v. *Elg*, 307 U. S. 325, 349-350, the Court directed that mandamus issue to the Secretary of State to

reconsider his discretionary denial of a passport because it had been based upon an error of law as to the applicant's citizenship.[19] In *Securities Commission* v. *Chenery Corporation*, 318 U. S. 80, 95, the Court held that, while the "exercise of administrative discretion" need not be justified "in any particular manner or with artistic refinement," it "cannot be upheld unless the grounds upon which the agency acted is exercising its powers were those upon which its action can be sustained. In *Accardi* v. *Shaughnessy*, 347 U. S. 260, the Court reversed a denial of habeas corpus to an alien whose deportation the Board of Immigration appeals refused to suspend; the Board's decision was wholly discretionary but was taken in the light of the Attorney General's listing of the alien as an "unsavory character" who should be deported. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, held that the Attorney General may not arbitrarily and without a hearing list an organization as subversive, even though the listing is merely a step in procedures looking to discretionary discharge.

3. *The Secretary in Discharging Petitioner Violated His Own Regulations.* The petitioner was charged, tried and ultimately removed as a loyalty and security risk. Throughout the proceedings the Department's underlying authority was based upon (a) Executive Order No. 9835 which as amended by Executive Order 10241 authorizes removal for "a reasonable doubt as to the loyalty of the person"; and (b) the McCarran Rider which authorized the Secretary "in his absolute discretion" to "terminate any employment" whenever he shall deem such termination necessary or ad-

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[19] The Court of Appeals for the District of Columbia has on several recent occasions ruled that the Secretary of State cannot base a discretionary denial of a passport upon invalid evidence or procedure. *Schachtman* v. *Dulles*, 225 F. 2d 943; *Boudin* v. *Dulles* (June 28, 1956; 6 Pike & Fisher Ad. Law 2d, 289); *Kraus* v. *Dulles* (July 5, 1956; *idem*, 293).

visable in the interests of the United States."[20] The Executive Order required specified procedures. The McCarran Rider itself required no procedural safeguards. But the Department's regulations, in Sec. 391.3, provided (*infra*, p. 34) that "In the exercise of this right [of discretionary discharge] the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program."[21] The formal letter of charges preferred against petitioner by the Chairman of the Department Loyalty Security Board, "for the Secretary of State", represented to petitioner in unmistakable terms that the Secretary's determination as to the necessity or advisability of petitioner's discharge "in the interests of the United States" would follow upon the Loyalty Security Board's recommendations as to whether petitioner was a security risk or of doubtful loyalty. (R. 29, 30.)

There can be no doubt that petitioner was proceeded against under the 1949 regulations of the Department. The charges were based on those regulations (R. 29). Those regulations were sent petitioner with the letter of charges (R. 29, 30). The hearing was scheduled under Section 393 of those regulations (R. 29). The Department of State Loyalty Security Board noted that "the issues here are (1) loyalty, and (2) security risk" (R. 23). The Deputy Under Secretary, who was authorized to review this determination by Sections 395.6 and 396.7 of the 1949 regulations, on at least three occasions did so and approved the Loyalty

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[20] As petitioner was a Foreign Service officer, entitled by statute (22 U.S.C. Secs. 1007, 1008) to procedural protections different from those under the Loyalty-Security program, the McCarran rider was a necessary supplement to the Department's authority if it was to proceed under the Loyalty-Security regulations.

[21] By his letter of September 6, 1950 to the Secretary of State (R. 90), the President in effect directed the Secretary to exercise his absolute discretion under the McCarran rider subject to the procedural guarantees of the Act of August 26, 1950 (5 U. S. C. Sec. 22-1).

Security Board decision (R. 33, 42-43, 63). The Loyalty Review Board post-audit, hearing and "reversal" was asserted only under the Executive Order.

Not until the Government's brief was filed with the District Court was there any suggestion that petitioner was removed only under the McCarran rider, and quite independently of the Executive Order and of the Department's procedural regulations. The respondents' argument, although substantially accepted by the courts below, puts the Secretary and the Department in the unattractive position of promising to petitioner that his case was being heard on specified charges and under described procedures and subsequently urging to the courts that both the charges and the procedures were quite immaterial to his removal. The argument, moreover, is squarely contradicted by every relevant word of the record, and flies in the teeth of the affidavit of the former Secretary who says that he acted *both* under the Executive Order and the McCarran rider, and nowhere asserts that petitioner was removed only "in the interests of the United States" under the McCarran rider (R. 82).

Whether or not the Secretary of State *could* otherwise have removed petitioner under the McCarran rider without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend, with respect both to the McCarran rider and the Executive Order, the procedural protections of his regulations. The Court "in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Securities Comm'n.* v. *Chenery Corp.*, 332 U. S. 194, 196. The courts below, in assuming that the Secretary exercised his discretion in a vacuum and without reference to the Departmental procedures under which petitioner

was charged and his case heard, have followed the Government briefs in preference to the record.

The 1949 regulations, under which petitioner was charged and tried,[22] were in two respects violated by his removal. (a) Under Sec. 395.6, a favorable decision of the Loyalty Security Board was to be reviewed by the Deputy Under Secretary and, if approved, the case was to be closed. The petitioner three times received a favorable decision from the Loyalty Security Board which was reviewed and approved by the Deputy Under Secretary. Under the regulations, his case was closed. In fact, it was three times reopened by a lawless exercise of "post-audit" jurisdiction by the Loyalty Review Board, and the Secretary finally intervened in the case solely on the basis of its final decision. (b) Both Executive Order 9835 (Part II, Sec. 3) and the regulations (Secs. 395.1 and 396.1) provide for an appeal to and a hearing before the Secretary or his designee before separation from employment; petitioner's request for an appeal to the Secretary, made a few hours after notice of the Loyalty Review Board decision, was denied.

The courts below rested their decision upon the bald assertion that "It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of

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[22] The Government has urged below that the applicable regulations were those of 1951, not 1949. But the 1951 regulations were never published, and petitioner was never advised of their existence until this case reached the District Court. He was supplied a copy of the 1949 regulations, and the charges and opinions were based on those regulations. Quite obviously the secret 1951 regulations cannot validly be applied to this case. But even if they were, petitioner's removal is in violation of the 1951 regulations: (a) Sec. 391.3 makes the regulations applicable to action under the McCarran rider. (b) Sec. 393.1 provides that decisions by the Secretary as well as the Loyalty Security Board "shall be reached after consideration of the complete file, arguments, briefs and testimony presented." Quite obviously this requirement is not met by reading an unlawful opinion of the Loyalty Review Board. (c) Sections 396.11 and 396.12 allow an appeal to the Secretary from a decision requiring removal from employment, which right was denied petitioner.

Executive Order 9835 in dismissing employees under Public Law 188" (R. 88, 98; *infra*, p. 71).

The assertion is wholly unsupported and is contradicted by compelling evidence to the contrary. The State Department in the Spring of 1950 submitted to the Tydings Committee a comprehensive report on its procedures. This report is reproduced *in extenso* in the report of the Tydings Committee (S. Rept. 2108, 81st Cong., 2d Sess. pp. 14-18); the Committee in this respect said that it was "fully satisfied" with the departmental procedures (pp. 18, 23). The State Department report specifically stated (pp. 15, 16):

> After enactment of the McCarran rider the Department did not contemplate that the legislation required or that the people of this country would countenance the use of "Gestapo" methods of harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo * * * Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran Rider as an additional standard for dealing with security problems in the Department * * * In [its] considered view the McCarran Rider was subject to procedural limitation. The McCarran Rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims * * * The unique powers conferred on the Department as a result of continuous reenactment of the McCarran Rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive Order and under the McCarran rider.

The Report of the Tydings Committee received somewhat more than the usual attention from the members of the Congress. The McCarran Rider was nevertheless reenacted without change. 64 Stat. 768; 65 Stat. 575. The assertion

of the courts below is, moreover, contradicted by the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. Sec. 22-1 *et seq.*) which replaced the McCarran Riders and provided procedures closely corresponding with those of Executive Order 9835. See *Cole* v. *Young*, 351 U. S. 530.

Quite apart from the extraordinary speculation of the courts below as to the Congressional intent, the decision below must be either (a) that the Department regulations, offering minimal procedural safeguards in proceedings under the McCarran Rider, were somehow invalid, or (b) that the Secretary, having been granted summary powers, was wholly free to disregard his regulations. The decision is in either case in conflict with the decisions of this Court and of other courts of appeals.

If a Government official or agency lawfully prescribes rules of procedure, they are binding on the Government as well as the citizen. The Secretary of State promulgated regulations which promised (a) that a case was closed upon approval by the Deputy Under Secretary of favorable decisions; and (b) that there could be appeal to and hearing before the Secretary before action upon an unfavorable decision. Having done so, he was bound by those regulations and could not lawfully ignore them, even though his substantive decision lay within his discretionary authority. *Bridges* v. *Wixon*, 326 U. S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.*, 338 U. S. 621, 629; *Bilokumsky* v. *Tod*, 263 U. S. 149, 155. "As long as the regulations remain operative," the Secretary "denies himself the right to sidestep the Board," *Accardi* v. *Shaughnessy*, 347 U. S. 260, 267, to intervene to reopen and reverse a case which under his regulations is closed, or summarily to discharge an employee who by his regulations is entitled to an appeal.

The Second Circuit requires that the discretionary power to suspend deportation be exercised in accord both with the procedural regulations, *United States ex rel Weddeke* v.

Watkins, 166 F. 2d 369, 371, cert. den., 333 U. S. 876, and with the established practice, *United States* v. *McGrath*, 181 F. 2d 839, 841, dismissed as moot, 340 U. S. 940. The Sixth Circuit has invalidated a war surplus sale contract provision which forbade resale, contrary to the governing regulation, which "binds the administrator himself equally with others." *School District 2 Fractional* v. *United States*, 229 F. 2d 681, 685.[23] The decision below cannot be reconciled with this settled and salutary doctrine.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1956.

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[23] Other cases in the courts of appeals which enforce the alien's right to procedural protection held out by the regulations governing discretionary action are *United States* v. *Perkins*, 79 F. 2d 533 (C.C.A. 2); *Sibray* v. *United States*, 282 Fed. 795 (C.C.A. 3); *Mah Shee* v. *White*, 242 Fed. 868 (C.C.A. 9). Others which forbid the agency even in discretionary action to depart from its usual practice are *N. L. R. B.* v. *Mall Tool Co.*, 119 F. 2d 700, 702 (C.C.A. 7); *Berchem* v. *R. F. C.*, 191 F. 2d 922 (Em. Ct. App.).

APPENDIX

APPENDIX A

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The "McCarran Rider" to Appropriation Acts of the U. S. Department of State (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768):

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Notes: (1) In the first of the cited provisions, for the Fiscal Year 1947, the final period as quoted above was a comma with the following clause added—

> "but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

(2) In the first three of the cited provisions, in place of the phrase "during the current fiscal year," there appeared the phrase "on or before June 30, [1947, 1948 or 1949]."

Executive Order No. 9835 (12 Fed. Reg. 1935):

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 611), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to

loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be in-

formed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as in the discretion of the employing department or agency, security considerations permit and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal to the head of the employing department or agency or to such person or persons as may be designated by such head under such regulations as may be prescribed by him, and the decisions of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security

techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V—Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic oganization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI—Miscellaneous

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure

of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

The White House
March 21, 1947.

Executive Order No. 10241 (16 Fed. Reg. 3690):

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 9A of the act approved August 2, 1939 (5 U.S.C. 118), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government", be, and it is hereby, amended to read as follows:

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

The White House,
April 28, 1951.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted March 11, 1949:

391 *Authority and General Policy*

391.1 The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk.

391.2 The necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons, and the obligation to protect employees and applicants from unfounded accusations of disloyalty, have been recognized in Executive Order 9835 which establishes the President's Loyalty Program. The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in Title 5, Chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State. So far as it relates to the handling of loyalty cases, the statement of procedure below is promulgated in accordance therewith.

391.3 In addition, the Secretary of State has been granted by Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

392 *Loyalty Standard*

Part V of Executive Order 9835 provides as follows:

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of

Government of the United States by unconstitutional means.

393 *Security Principles of the Department of State*

393.1 *Categories Constituting Security Risks*

As used herein, an officer or employee constitutes a security risk when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to compel the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily

or involuntarily divulge classified information without authority.

393.2 *Determining a Security Risk*

In determining whether or not a person is a security risk, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to above, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violation of security regulations.

d. Voluntary association with persons known or believed to be [illegible] categories a or b of sec. 393.1.

393.3 *Considerations in Weighing Evidence*

393.31 A former course of conduct or holding of beliefs will be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.32 If a reasonable doubt exists as to whether the person falls into one of the categories listed in sec. 393.1, the Department will be given the benefit of the doubt, and the person will be deemed a security risk.

394 *Prehearing Procedures of the Loyal and Security Board*

394.1 *Loyalty Cases*

394.11 All cases in which a report of a loyalty investigation is received shall be referred for consideration to the LSB which shall take action on every case so referred. The LSB shall examine the report of investigation and may request further investigation if such action appears to be necessary. Whenever practicable, such request shall be specific as to the additional information required.

394.12 The LSB shall consider the report of investigation in the light of the loyalty standard as set forth in sec. 392 and shall determine whether such report warrants a finding clearly favorable to the individual or appears to call for further processing of the case with a view to possible removal action. If the LSB reaches a clearly favorable conclusion, it shall so determine and recommend to the Assistant Secretary—Administration that favorable action be taken. If the LSB determines that such report does not warrant a finding clearly favorable to the individual, the procedures set forth in secs. 394.13, 394.14, 394.15, 394.16 shall be followed.

394.13 In all cases in which the evidence indicates that removal action may be warranted, the LSB shall serve the officer or employee with a notice in writing which shall state the nature of the charges against him in factual detail, setting forth in particular the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation.

394.14 The officer or employee shall be informed of his right to answer the charges in writing, under oath or affirmation, within a reasonable period of time, not less than 10 calendar days from the date of receipt by the employee of the notice; of his right to have an administrative hearing on the charges before the LSB not less than 15 calendar days before such hearing is

to take place; and of his right to appear before the LSB personally, to be represented by counsel or representative of his own choosing, and to present evidence in his own behalf.

394.15 The notice shall be given to the employee at least 30 calendar days in advance of the effective date of the proposed removal action, except as provided in the Federal Personnel Manual. It shall state the work and pay status in which he will be carried during the notice and until the determination of the LSB, and the authority or authorities (Executive order and statute, if appliable) under which the notice is sent.

394.16 After giving the employee the foregoing notice, the LSB shall proceed as follows:

a. If the incumbent or excepted employee does not reply to the notice within the time specified by the LSB, the LSB shall consider the case on the complete file and recommened action to the Assistant Secretary—Administration.

b. If the incumbent or excepted employee answers the charges in writing but does not request a hearing, the LSB shall then consider the case on the complete file (including such answer) and recommend action to the Assistant Secretary—Administration.

c. If the incumbent or excepted employee requests a hearing before the LSB, a time and place for such hearing shall be set by the LSB, as convenient to the employee as circumstances permit and within the times specified in the notice of hearing referred to in secs. 394.13, 394.14 and 394.15 above, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense. This hearing shall be conducted in accordance with the provisions of sec. 395.

394.2 *Security Cases*

394.21 The LSB shall take action in the cases of all officers and employees which are referred to it by the responsible authorities of the Department.

394.22 The LSB shall make a determination in such cases that the officer or employee concerned shall be given the right of a hearing to determine whether his continued employment constitutes a security risk to the Department or whether, on the basis of the record presented, the continued employment of the officer or employee does not constitute a security risk to the Department.

394.23 If the LSB determines that the officer or employee should be given the right of a hearing, the procedures set forth in secs. 394.13-394.16 and 395, shall be followed.

395 *Hearing Procedure of the Loyalty and Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in sec. 394, before any officer or employee of the Department of State or of the Foreign Service of the United States is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to a hearing before the LSB and an appeal to the Secretary of State, or his designee or designees. If he is charged with disloyalty, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interests of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the LSB may deem proper.

395.3 *Hearings*

395.31. The hearing shall be private and shall be attended only by the members of the LSB, other appropriate Government officials connected with the adjudi-

cation process, the officer or employee, his counsel or representative, and the witness who is testifying.

395.32 The Chairman of the LSB shall preside; the officer or employee shall be permitted to appear personally, and either by himself or by his representative or counsel to present evidence in his own behalf, through witness or by affidavit.

395.33 Testimony shall be given under oath or affirmation. Members of the LSB may ask such questions of him and his witnesses as they may desire.

395.34 A stenotypist record will be made of the proceedings by a person or persons designated by the LSB and no other transcript shall be made. A copy of the transcript will be provided to the officer or employee upon request.

395.35 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the record of the hearing has been reduced to writing, the LSB will convene in executive session to reach a decision.

395.42 In its consideration, the LSB shall be governed by the loyalty standard provided in sec. 392 or the security principles provided in sec. 393, depending upon the nature of the case and the evidence submitted. After examination of the evidence and following any desired discussion, the vote shall be by ballot and the decision by majority vote. The vote by each member shall be recorded.

395.43. In arriving at its decision, the LSB shall take into consideration the fact that the employee may have been handicapped in his defense by the non-disclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the LSB shall be one of the following:

a. The LSB recommends that, on the evidence submitted, the officer or employee should not be separated from employment under the loyalty standard referred to in sec. 392, or as a security risk under the security principles provided in sec. 393, and further recommends either that the case be closed or that further investigation be made along specific lines, with or without suspension; or

b. The LSB recommends that the officer or employee be separated from employment for disloyalty under the loyalty standard referred to in sec. 392 and as a security risk under the security principles provided in sec. 393; or

c. The LSB recommends that the officer or employee be separated from employment as a security risk under the security principles provided in sec. 393.

395.52 If the recommendation of the LSB is for separation from employment, it may, depending upon the nature of the case, the evidence presented, or consideration of mitigating circumstances, suggest that the officer or employee be dismissed or that, upon his request, he be permitted to resign.

395.53 The decision of the LSB shall be made in writing and shall be signed by the members of the LSB. It shall state the action taken and shall be made a permanent part of the record. The record shall be classified as secret and transmitted to the Assistant Secretary—Administration.

395.6 *Action by Assistant Secretary—Administration*

Upon receipt of the record including the decision of the LSB, the Assistant Secretary—Administration shall take whatever action he deems appropriate with respect thereto and may, if the situation warrants,

suspend the officer or employee pending further investigation or any appeal which may be made. If the decision of the LSB is favorable to the officer or employee concerned and is concurred in by the Assistant Secretary—Administration, he will so notify the officer or employee.

396 *Appeals*

396.1 *Notification of Separation and Right of Appeal*

396.11 If the decision is for separation from employment for disloyalty and as a security risk, or only as a security risk, the officer or employee shall be so notified by the Assistant Secretary—Administration and advised in writing of his right to appeal to the Secretary of State, or his designee or designees, within 10 calendar days after receipt of such notification. In those cases where separation from employment is contemplated only on the grounds of a security risk, the notice will state that the officer or employee is not considered disloyal by the Department.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary, or his designee or designees, will afford the officer or employee a hearing on the record at a date not earlier than one week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary, and/or his designee or designees, the officer or employee, and a single counsel or representative of his own choosing. The officer or employee shall be permitted to appear personally, and either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned. A stenotypist record will be made of the proceedings and a copy of the transcript will be provided to the officer or employee upon request.

396.2 *Decision Against Removal*

396.21 If, as a result of such hearing, the Secretary of State decides that there is insufficient evidence to support removal under the loyalty standard referred to in sec. 392, and under the security principles referred to in sec. 393, he may direct that the case be closed, that further investigation be conducted, or that the officer or employee be dismissed or permitted to resign as a security risk.

396.22 If the Secretary of State decides that there is insufficient evidence to support removal under the security principles referred to in sec. 393, he may direct that the case be closed or that further investigation be conducted.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing.

396.3 *Decision for Separation from Employment*

396.31 If, as a result of such hearing, the Secretary of State decides that the officer or employee should be separated from employment, the officer or employee will be so notified in writing. In such event the Secretary of State may, in addition, direct his suspension if he is not already suspended or may permit him to resign.

396.32 If the decision is that the officer or employee should be separated from employment for disloyalty and as a security risk, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 days after the receipt of the notice in the case of persons living within the continental United States and within 30 days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Advisory Recommendation by the Loyalty Review Board*

If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the loyalty standard referred to in sec. 392, the Department will take prompt adminisfrative action to remove him from employment.

396.5 *Action on Findings of the Loyalty Review Board*

396.51 If, after hearing an appeal from a decision that an officer or employee should be separated from employment for disloyalty and as a security risk, the Loyalty Review Board makes a finding that reasonable grounds do not exist for the belief that the officer or employee is disloyal, the Secretary of State or his designee, may:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Permit the officer or employee to resign from the Department; or

c. Terminate the employment of the officer or employee under the authority conferred by Title I of the Appropriations Act of 1948 (McCarran Rider) or other appropriate authority.

396.52 Prior to final action, the Secretary of State, or his designee, may refer the case to the LSB and obtain a recommendation whether the officer or employee should be separated from employment as a security risk.

396.6 *Cases Involving Separations Not Subject to Review by the Civil Service Commission*

In the event of a decision that an officer or employee should be separated from employment only as a security risk and the case does not fall within the category of cases subject to review by the Civil Service Commission, the Secretary of State will normally permit the

officer or employee to resign from the Department in lieu of terminating his employment. This policy is adopted since no forum will exist outside the Department in which the officer or employee may affirmatively establish his loyalty.

396.7 *Decision that Employee is Loyal and Not a Security Risk*

If the Assistant Secretary—Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted May 4, 1951, and revised September 21, 1951:

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in

the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F.R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the Board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of Government of the United States

by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of Section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standards and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or

to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is re-

ceived shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13 through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writ-

ing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and

General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer of employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to

the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2(a)(2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in ac-

cordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in section 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyal Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he

may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyal Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyal Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will not include all material in the file of the case, in that it will not include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or

information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the hearing.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyal Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

(5-4-51)

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyal Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principle provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall not be a part of the written decision and shall in no instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determiantion unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances, the board

may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government, but that the determination as to

loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable grounds do not exist for belief that the officer's or employee's removal is necessary or advisable in the

interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds exist for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds exist for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds do not exist for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,958

JOHN S. SERVICE, APPELLANT

v.

JOHN FOSTER DULLES, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1956

Mr. C. E. Rhetts for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Mr. Paul A. Sweeney*, Attorney, Department of Justice, was on the brief, for appellees.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This is an appeal from a judgment granting defendants' (appellees') motion for summary judgment.

Plaintiff (appellant) was formerly a Foreign Service officer, who was dismissed by action of former Secretary of State Acheson. Appellees are the present Secretary of State, members of the Civil Service Commission, and the former members of the Loyalty Review Board of the Civil Service Commission, established by Executive Order No. 9835.

Appellant filed this suit to obtain a judgment declaring his discharge void and invalid; to obtain reinstatement to his employment and his salary from the date of his discharge to the date of his reinstatement; for the expunging from the record of statements reflecting that this dismissal had been on the ground that there was or is reasonable doubt as to his loyalty to the Government of the United States; and for certain other relief. On cross-motions for summary judgment, the District Court dis-

missed the case as moot as to the former members of the Loyalty Review Board of the Civil Service Commission as that Board had ceased to exist and, as to them, the action had abated; directed the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that there was reasonable doubt as to appellant's loyalty to the Government of the United States; granted appellees' cross-motion for summary judgment and denied appellant's motion for summary judgment.

The record discloses that under date of March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State notified appellant that a hearing had been scheduled under § 395 of the Regulations and Procedures of the Department of State to consider charges against him "with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State Appropriation Act, 1950, Section 104 Public Law 179, 81st Congress, First Session,[1] your [his] employment in the Department should be terminated in the interest of the United States." The letter setting forth the notification of charges read in part as follows:

> "'Under date of March 21, 1947, the President issued Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program in the Executive Branch of the Government. Under date of March 11, 1949, the Department of State promulgated regulations and procedures, a copy of which is attached, setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State.
>
> "In the course of investigations conducted pursuant

[1] Public Law 179, Sec. 104, provides as follows: "Sec. 104. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." (63 Stat. 456.)

to this loyalty and security program certain information has been received by the Department of State which, after initial consideration by the Loyalty Security Board of the Department of State, necessitates the formulation of a charge against you. . . ."

The specific charges were appellant's disloyalty to the United States and the claim that he was a security risk.

Following extensive hearings, the State Department Loyalty Board concluded that reasonable grounds did not exist for believing that appellant was disloyal to the United States and that he did not constitute a security risk to the Department of State. This was approved by the Deputy Under Secretary of State.

After the issuance of Executive Order No. 10241, amending the standard established by Executive Order No. 9835 for removal from employment on loyalty grounds, the Loyalty Security Board of the Department of State again considered appellant's case and determined that, under Executive Order No. 10241, no reasonable doubt existed as to appellant's loyalty to the United States. This decision likewise was approved by the Deputy Under Secretary of State.

Thereafter, the Loyalty Review Board of the Civil Service Commission advised appellant that it would hold a new hearing based on the charges filed by the Department of State Loyalty Security Board; and, after intermediate proceedings, the Civil Service Commission Loyalty Review Board rendered its opinion, holding that there was reasonable doubt about appellant's loyalty. The action subsequently taken by Secretary Acheson appears from his affidavit filed in the District Court, as follows:

"3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under

Section 103 of Public Law 188, 82d Congress, as to what action to take.

"4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

"5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilites as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment... ..."

The Supreme Court, in *Peters* v. *Hobby*, 349 U. S. 331 (1955), held that the power of the Loyalty Review Board of the Civil Service Commission was limited to "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any department or agency." Ac-

cordingly, the District Court held that the decision of the Loyalty Review Board was a nullity in a case where (like the present one) no such recommendation for dismissal had been made.

The appellant argues that the discharge was unlawful because the Secretary's action must be sustainable on the grounds which he invoked to support it; further, "by relying 'solely' on the invalid finding of the Loyalty Review Board and failing to make an independent determination on all the evidence and by denying appellant an opportunity to appeal to him, the Secretary violated his own regulations prescribing the manner in which he would exercise his McCarran Rider [2] authority and thereby denied appellant the procedural and substantive guarantees of these regulations." It is also argued that the Secretary, "exercised his discretion under the McCarran Rider, if at all, in an arbitrary and illegal manner in that he misapprehended the legal validity of the Loyalty Review Board finding on which he relied 'solely' and in that he failed to make an independent determination of his own that appellant's discharge was necessary or advisable in the interests of the United States."

Beginning in 1947 and continuing through the time covered by appellant's dismissal, Congress had enacted riders, all similar to Section 104, Public Law 179, quoted in note 1, *supra*, to the several appropriations acts covering the State Department, authorizing the Secretary of State to summarily dismiss officers and employees of that department "whenever he shall deem such termination necessary or advisable in the interests of the United States." [3]

The notice of termination of appellant's employment stated that such action was taken pursuant to the above quoted provision for summary dismissal *as well as* under Executive Order No. 9835, as amended by Executive Order No. 10241. The Secretary of State, in his affidavit filed

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[2] The term "McCarran Rider" has reference to Sec. 104, Public Law 179, note 1, *supra*, and similar subsequent enactments.

[3] We recently held a similar statute to be constitutional in the case of *Scher* v. *Weeks*, Secretary of Commerce, decided January 19, 1956, —— U.S. App. D.C. ——, 231 F.2d 494, cert. denied, June 4, 1956, —— U.S. ——.

in the District Court, stated that his action was taken under Executive Order No. 9835, as amended by Executive Order No. 10241, *and also* under Section 103 of Public Law 188, 82d Congress (the same provision as Section 104 of Public Law 179, 81st Congress, note 1, *supra*.)

As well expressed by Judge Curran, of the District Court:

> "This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to detemining whether any procedural requirement of the statute was violated in plaintiff's discharge.
>
> "Under Public Law 188 there was one procedural requirement: that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States. That determination the former Secretary of State made.
>
> "Plaintiff's contention that by virtue of the State Department's regulations he could not be dismissed under Public Law 188 unless the procedures prescribed by Executive Order 9835 were followed is without merit. It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.
>
> "Under Public Law 188 plaintiff could have been summarily dismissed without notice of charges, hearing, or appeal."

The District Court then concluded that appellant was validly discharged under Public Law 188. Under the circumstances of this case, we must agree.

We also think that the District Court was entirely correct in directing the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that there was reasonable doubt as to appellant's loyalty to the

United States as, under the *Peters* case, *supra*, the action of that Board was a nullity.[4]

The judgment of the District Court is Affirmed.

(1026-4)

[4] It is only fair to add that since the finding of the Review Board is a nullity, and since appellant's discharge is sustained only under Public Law 188, the following quotation from note 2 in *Scher* v. *Weeks*, *supra*, would seem equally applicable in this case: "It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE,

Petitioner,

v.

JOHN FOSTER DULLES, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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JANUARY 1957.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE,

Petitioner,

v.

JOHN FOSTER DULLES, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Loyalty Security Board of the Department of State is printed at R. 12-28. The opinion of the Loyalty Review Board is printed at R. 1-11. The opinion of the District Court is unreported and is printed at R. 85-88. The opinion of the Circuit Court of Appeals is reported at —— F. 2d —— and is printed at R. 92.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1956 (R. 98). The petition for certiorari was

filed September 11, 1955 (R. 99). The petition was granted November 13, 1956 (R. 99).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Statutes, Regulations and Constitutional Provisions Involved

This case involves:

(1) The Fifth Amendment to the Constitution of the United States, printed in Appendix A, *infra*, p. 51.

(2) The so-called McCarran Rider to various State Department appropriation acts (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, and 65 Stat. 581), printed in Appendix A, *infra*, p. 51.

(3) Executive Order 9835 (12 Fed. Reg. 1935), printed in Appendix A, *infra*, p. 52, as amended by Executive Order 10241 (16 Fed. Reg. 3690), printed in Appendix A, *infra*, p. 60.

(4) Department of State Regulations and Procedures relating to Loyalty and Security of Employees, (a) as adopted March 11, 1949, printed in Appendix A, *infra*, p. 61 and (b) as revised May 4, 1951 and September 21, 1951, printed in Appendix A, *infra*, p. 73.

Questions Presented

1. Whether the Secretary of State can validly exercise his statutory discretion to discharge petitioner by acting solely on the findings and opinion of the Loyalty Review Board in a case where the Board had no jurisdiction and where the Board's procedures in critical respects violated

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[1] By letter of the Clerk, dated December 27, 1956, the time for filing the brief for petitioner was, on request of the petitioner, extended until January 15, 1957.

both the Fifth Amendment and the Executive Order under which it purported to act.

2. Whether the Secretary of State can validly exercise his statutory discretion to discharge Government employees in the interest of the United States without following the procedures prescribed for the exercise of that discretion by his own regulations.

3. Whether the Department of State can, as urged by the respondents, institute and conduct loyalty-security proceedings against petitioner under regulations and procedures of the Department in effect at the time the proceedings were commenced and then, following the dismissal of petitioner resulting from those proceedings, base that dismissal upon later regulations and procedures of which the petitioner was not given notice, which were not published in the Federal Register, and of whose existence the petitioner was not advised until this case was before the District Court.

Statement of the Case

The case comes to this Court from the affirmance by the Court of Appeals for the District of Columbia Circuit of a judgment in the trial court which granted part of the relief sought by the petitioner but denied his motion for summary judgment and granted respondents' cross motion. There was no testimony introduced by either side in the trial court. The statement of the case which follows is based on facts pleaded in the third amended complaint (R. 40-61) and admitted in the answer (R. 62-67), the admissions of respondents (R. 68-69), the affidavit of petitioner in support of his motion for summary judgment (R. 71-75), and the affidavit of the former Secretary of State in support of respondents' cross motion (R. 81-83). In addition, in order to explain how the case arose, the statement refers in places to the

transcript of the hearing before the Department of State Loyalty Security Board.[2]

From October 1935, until December 14, 1951, petitioner served continuously as a Foreign Service Officer of the United States, advancing by promotion to Class 2 of the Foreign Service (R. 41, 63). All of his service as a Foreign Service Officer between 1935 and 1945 was in China. He was rated by Ambassador Gauss, the last Ambassador under whom he served in China, as "one of the ablest and most promising young officers of the China corps and the service in general."[3] From 1943 to 1945 he was assigned to duty as a political reporter with the United States Army in China and in 1944 and 1945 was sent as an observer for the Army to Chinese Communist Army headquarters in Yenan.[4] The Loyalty Security Board of the Department of State found petitioner's reports to be "objective, and extraordinarily accurate as political forecasts of what was to come" (R. 16). It was a part of petitioner's duties while assigned to the Army to supply background material to American newspapermen in China, including, in his discretion, material from his own reports.[5]

In April 1945, on termination of his Army assignment and shortly after his return to the United States, petitioner lent a few of his personal copies of his reports to one Philip Jaffe, editor of Amerasia magazine; those selected by Service, according to the State Department Loyalty Security Board, "contained nothing that could be considered harmful to the national security" (R. 25). Jaffe at the time was under close surveillance by the F. B. I. (R. 21). In June

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[2] The transcript of the hearing before the Department of State Loyalty Security Board is printed in the Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 81st Cong., 2d Sess., pursuant to S. Res. 231, pp. 1958-2509, hereinafter referred to as the "Tydings Committee Hearings."

[3] Tydings Committee Hearings, p. 2067.

[4] Tydings Committee Hearings, pp. 1962-1974.

[5] *Ibid.*, pp. 2005-2006, 2095-2098; R. 24.

1945 petitioner, Jaffe; and four others were arrested by the F. B. I. on warrants charging conspiracy to violate the Espionage Act. Petitioner appeared and testified before a federal grand jury in August 1945, and the jury thereafter voted unanimously not to indict him.[6]

From the time of his arrest, petitioner had been on leave of absence with pay. When the grand jury found no basis for an indictment against him, Secretary of State Byrnes, acting on the recommendation of the Foreign Service Personnel Board, on August 14, 1945, restored him to active duty; he predicted "a continuance of the splendid record I am advised you have maintained since first you entered the Foreign Service", while Under Secretary Grew on the same day wrote his pleasure that petitioner was returning to Far Eastern duty "where you have established an enviable record for integrity and ability."[7] In May 1948 petitioner was promoted to Class 2 in the Foreign Service.[8]

The Department of State reviewed petitioner's case a number of times over the next five years, and cleared him in 1945, 1946, 1947 and 1949.[9] In early 1950 the favorable decision of the Department Loyalty Security Board in 1949 was under "post-audit" review by the Loyalty Review Board (R. 1, 33). On January 5 and February 20, 1950, petitioner was attacked on the Senate floor.[10] On March , 1950, a panel of the Loyalty Review Board acting on "post-audit" recommended that petitioner's case be "remanded" to the Department. The accusing Senator so advised the Tydings Committee on the morning of March 14, 1950.[11] By letter dated March 14, 1950, the Loyalty Review Board

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[6] *Ibid.*, pp. 2234-2237, 2290, 2347.

[7] Tydings Committee Hearings, pp. 2347-2348.

[8] *Ibid.*, p. 2385.

[9] Testimony in February 1949 before House Sub-Committee on Appropriations, Hearings, 81st Cong., 1st Sess., p. 298.

[10] Tydings Committee Hearings, p. 1902; 96 Cong. Rec. 1956.

[11] *Ibid.*, p. 131.

directed the Department of State Loyalty Security Board to reconsider petitioner's case and to hold a hearing on charges (R. 12). On March 16, 1950, petitioner, who was then aboard ship en route to his assignment as Officer in Charge at Calcutta, was directed to return to Washington.[12]

On March 24, 1950, the Chairman of the Department of State Loyalty Security Board sent to petitioner a letter of charges. This letter (R. 28) referred to the 1950 McCarran Rider, authorizing the Secretary of State "in his absolute discretion" to discharge any employee in the Department "whenever he shall deem such termination necessary or advisable in the interests of the United States," to Executive Order 9835, and to the Department's Regulations and Procedures of March 11, 1949, relating to Loyalty and Security of Employees, a copy of which was enclosed. The letter stated that the charges were based on Sections 392.2(f) [suspect associations as evidence of disloyalty] and 393.1(d) [suspect associations as evidence of security risk] of said Regulations and Procedures. It advised that a hearing would be held on these charges to determine whether petitioner's employment should be terminated in the interests of the United States.

After 15 days of hearings, the Loyalty Security Board on October 24, 1950, found (a) that petitioner was neither disloyal nor insubordinate in his relations to former Ambassador Hurley; and (b) that, although petitioner had been indiscreet in lending his reports to Jaffe, the circumstances of these disclosures contained no evidence of disloyalty, and that the experience suffered by petitioner as a consequence of this indiscretion "has served to make him far more than normally security conscious." Accordingly, the Board concluded (1) that reasonable grounds did not exist for the belief that petitioner was disloyal to the United

[12] *Ibid.*, p. 1905.

States and (2) that petitioner did not constitute a security risk (R. 14-28). These findings and conclusions of the Loyalty Security Board were approved by the Deputy Under Secretary of State (Administration) pursuant to authority delegated to him by the Secertary of State (R. 42-43, 63).

The Loyalty Review Board, again acting by way of "post-audit," returned the case to the Department of State (R. 33). Executive Order 10241 was issued on April 28, 1951, to amend the loyalty standard previously established by Executive Order 9835. The departmental Loyalty Security Board again considered petitioner's case, under the new and stricter standard, and on July 31, 1951, determined that "no reasonable doubt exists as to his loyalty to the United States" (R. 42, 63). These findings and conclusions of the Loyalty Security Board were also approved by the Deputy Under Secretary of State (Administration) (R. 42-43, 63).

By letter of October 11, 1951 (R. 78) the Loyalty Review Board of the Civil Service Commission advised petitioner that it had again conducted a "post-audit" of his case pursuant to Regulation 14 of the Loyalty Review Board,[13] and had determined that the Loyalty Review Board would itself conduct a new hearing "upon the charges heretofore issued to you by the Department of State Loyalty Security Board." A hearing was held before a panel of the Loyalty Review Board on November 8, 1951. Since the Loyalty Review Board admittedly had no jurisdiction over matters of security, this hearing was confined to the question of petitioner's loyalty. In addition to interrogating petitioner about the lending of his reports to Jaffe, the Review Board panel had before it, but would not allow petitioner to see,

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[13] Regulation 14 as it then read (13 Fed. Reg. 255, as amended 13 Fed. Reg. 9366) is set out in the Board's letter (R. 78-79). It was later amended (17 Fed. Reg. 631) to read as set out in *Peters* v. *Hobby*, 349 U.S. 331, 341, 342 (1955).

summaries or digests supplied by the F.B.I. of recordings made by the F.B.I. of conversations between petitioner and Jaffe (R. 68-69, 74).

Subsequent to this hearing, petitioner's attorney and the Chairman of the Loyalty Review Board entered into a stipulation to the effect that evidence had been taken at the hearing before the Loyalty Review Board on the issue as to whether petitioner had disclosed information of a confidential or non-public character within the meaning of paragraph d of paragraph 2a of Part V, "Standards," of Executive Order 9835, as amended; that, since the letter of charges given petitioner had not stated specifications as to the intentional or unauthorized disclosure by petitioner of information of a confidential or non-public character, in order to avoid returning the case to the Department of State for an amendment of the letter of charges, it was agreed that the Loyalty Review Board might make a determination as if the original letter of charges had contained such a charge (R. 32).

The stipulation between the Chairman of the Loyalty Review Board and petitioner's attorney further provided:

> . . . that the case before this Board shall be considered as if the Department of State Loyalty-Security Board had made a determination that no reasonable doubt of Service's loyalty exists when the facts are considered in relation to said section 393.2d and that the foregoing stipulation shall not be deemed to alter or affect in any way the significance properly attributable to the failure of the Department of State in fact to lay a charge of disloyalty under said section 392.2d and its determination instead to lay a security risk charge under section 393.1a of its regulations..

Section 393.1a of the regulations and procedures of the Department of State refer to the 1949 regulations and proce-

dures. The 1951 Department of State Regulations and Procedures relating to Loyalty and Security of Employees contains a similar section, numbered, however, Section 393.2.[14]

On December 12, 1951, the Loyalty Review Board panel issued an opinion finding (a) that there was no evidence of communist affiliations, but (b) that petitioner had lent some of his reports to Jaffe and in his conversations with Jaffe had disclosed other information which the Board considered confidential; from this it concluded that there was a reasonable doubt as to petitioner's loyalty, and directed that the favorable finding of the departmental Loyalty Security Board be "reversed" (R. 1-11).

On December 13, 1951, the Chairman of the Loyalty Review Board directed a letter to the Secretary of State transmitting the opinion of the panel, reciting the Loyalty Review Board's "opinion" that petitioner should forthwith be removed from service, and concluding: "Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service" (R. 33-35). On the same day, petitioner's attorney was advised by letter from the Chairman of the Loyalty Review Board that the Board had "reversed" the finding of the departmental Loyalty Security Board (R. 80). Petitioner and his attorney immediately sought and at about 6:00 P.M. that same day obtained an interview with the Deputy Under Secretary of State (Administration). Petitioner requested that any action be withheld at least for twenty-four hours until he could address an appeal to the Secretary of State or a request for reconsideration to the Loyalty Review Board. The Deputy Under Secretary declined to withhold immediate action, stating that the determination to separate petitioner from the Foreign Service had already been reached,

[14] Appendix A, *infra*, p. 77.

that the decision of the Loyalty Review Board was binding on the State Department, and that members of the press had been notified some two hours earlier that a public statement was about to be issued on the case (R. 72). This notice was given the press within four hours after receipt of the Loyalty Review Board opinion within the Department (R. 50, 66, 72). At the same time the Deputy Under Secretary gave petitioner a copy of a press release, which was issued by the Secretary of State later on December 13. That press release (R. 35-37) said in part:

> The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. Those Regulations are binding on the Department of State.
>
> The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

At this time the Regulations of the Loyalty Review Board (13 Fed. Reg. 9372, 5 CFR Section 220.4(d)) provided: "It is necessary that the head of an agency follow the recommendation of the Loyalty Review Board in all cases." The 1949 Department of State Regulations and Procedures relating to Loyalty and Security of Employees provided in Section 391.2 that the Regulations of the Loyalty Review Board "constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State." They also provided in Section 396.4: "If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of

State that the officer or employee should be removed from employment under the loyalty standard referred to in Sec. 392, the Department will take prompt administrative action to remove him from employment." The revised Department Regulations and Procedures of 1951, which have never been published and of which petitioner was unaware until this proceeding reached the courts, contain the same provision with slight modification.[15]

On December 14, 1951, petitioner received a letter from the Deputy Under Secretary (Administration), dated December 13, advising him that the Loyalty Review Board had found, as a consequence of his unauthorized disclosure of documents and information, that there was a reasonable doubt as to his loyalty, and that pursuant to that finding his employment was terminated as of the close of business December 14, 1951, "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress" [the then-current McCarran Rider] (R. 75). The Department's Notice of Personnel Action, dated December 17, 1951, states that the terminating action was taken "pursuant to the decision of the Loyalty Review Board," and cites as "termination authority" Executive Order 9835 and the McCarran Rider (R. 84). Petitioner thereafter sought clarification of the reason for termination of his services and on December 27, 1951, was advised by letter from the Deputy Under Secretary "that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board" (R. 76).

Petitioner after vain efforts to obtain reconsideration by the Loyalty Review Board and the Civil Service Commis-

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[15] Section 396.4 of the 1951 regulations is made applicable to adverse loyalty determinations by the Loyalty Review Board "on appeal." But neither the 1949 nor the 1951 regulations of the Department of State make any express provision for disposition of cases following the Review Board's unlawful "post-audit."

sion [16] instituted the present action. His third amended complaint asked for a declaratory judgment that his separation from service was invalid, that all defendants be directed to expunge fom their records all written statements reflecting that petitioner's employment had been terminated on the ground that there was a reasonable doubt as to his loyalty to the United States, and that the Secretary of State be directed to reinstate petitioner to his employment and former grade in the Foreign Service with full restoration of property rights and payment of accumulated salary (R. 59-61). Following the Government's answer, both parties filed motions for summary judgment (R. 70; 80). To the Government's motion was attached the affidavit of the former Secretary of State (R. 81); it was dated January 19, 1953, and said in material part:

> 3. On that same day [December 13, 1951] I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.
>
> 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Sec-

[16] The complaint alleges and the answer admits that petitioner "has in every respect exhausted every administrative remedy available to him" (R. 51, 66). The motion to vacate and reconsider was filed with the Loyalty Review Board on December 20 and denied on January 7, 1952; it urged the Board's lack of authority to reverse a favorable Departmental decision. Exs. J and K to complaint. The request for review by the Civil Service Commission was filed January 7 and denied April 1, 1952 (R. 38).

tion 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before these boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

6. Attached to this affidavit * * * are copies of Notice of Personnel Action * * * which correctly reflect the action taken to terminate Mr. Service's employment.

On the day before this case was argued in the District Court, this Court in *Peters* v. *Hobby*, 349 U.S. 331, held in-

valid Regulation 14 of the Loyalty Review Board, a decision of a panel of the Board thereunder following a "post-audit" hearing, and a decision of a department head based on the Review Board's decision, on the ground that the reviewing authority of the Loyalty Review Board was confined by Executive Order 9835 to cases of "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any Department or Agency."

On authority of the *Peters* case, the District Court declared the action of the Loyalty Review Board a "nullity" and directed the Civil Service Commission to expunge from its records the Board's finding that there was a reasonable doubt as to petitioner's loyalty. But with respect to the other relief sought by petitioner, the District Court granted summary judgment for respondents (R. 89). The Court of Appeals affirmed (R. 92).

Summary of Argument

I

A. The Loyalty Review Board acted without jurisdiction when after a favorable determination of the petitioner's case by the Department of State Loyalty Security Board, it held a hearing on the case, and found that there was a reasonable doubt as to petitioner's loyalty to the United States. The petitioner could not lawfully be discharged on the basis of findings and an opinion of the Loyalty Review Board entered without jurisdiction. *Peters* v. *Hobby*, 349 U.S. 331, 345.

B. The Loyalty Review Board not only acted outside its jurisdiction but the procedures which it followed in petitioner's case violated the Fifth Amendment and Executive Order 9835. The Board based its decision chiefly on the summaries or digests of four intercepted conversations between petitioner and Jaffe. It denied the petitioner any information either as to the recordings or as to the contents

of the summaries or digests. Not even the Board was supplied by the FBI with the recordings or exact transcriptions thereof. Both the petitioner and the public knew considerably before the hearing conducted by the Loyalty Review Board in petitioner's case that the FBI had made recordings of conversations between petitioner and Jaffe.

At least when there are no considerations of national security with which to contend, it has been consistently held that, in a quasi-judicial or adversary administrative hearing evidence, which, either in whole or in part, forms the basis of the agency's decision cannot be withheld from one of the parties to the proceeding. *Ohio Bell Telephone Company* v. *Public Utilities Comm.*, 301 U.S. 292, 300-305. *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed without opinion by an equally divided court, 341 U.S. 918, does not require or suggest a different conclusion.. There is no confidential informant involved in the instant case. In no conceivable circumstances, therefore, could the investigative process or the national security be imperiled if petitioner were advised of what he was supposed to have said or heard in his conversations with Jaffe. An analogy in support of petitioner's contention that he should have been furnished the secret evidence on which the Board relied in reaching its decision is found in cases arising under the Selective Service Act in which this Court has held that an administrative decision may not be based on evidence of which at least a fair resume has not been given to the party affected. *Simmons* v. *U. S.* 348 U.S. 397; *Gonzales* v. *U. S.*, 348 U.S. 407.

In addition to offending due process the Loyalty Review Board's reliance on secret evidence violated Executive Order 9835. The provisions of that Order show that it "does not contemplate arbitrary secrecy", *Jay* v. *Boyd*, 351 U.S. 345, 358, such as indulged in by the Loyalty Review Board in this case.

C. The contemporary evidence was unmistakable that

petitioner was discharged in automatic consequence of the unlawful action of the Loyalty Review Board. The Board at the time was of the view that the Secretary of State was required to remove petitioner as a consequence of its decision. Its regulations so provided, as did those of the Department of State. The Deputy Under-Secretary advised the petitioner that his removal was "required" as a result of the Board's action. The affidavit filed in this litigation by the former Secretary of State who discharged the petitioner is both clear and candid on this point. His determination to discharge petitioner was made "solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of the Board." Executive discretion which is based upon unlawful grounds is an abuse of discretion, and under decisions of this Court it may not stand. *Perkins* v. *Elg*, 307 U.S. 325, 349-350; *Securities Comm'n.* v. *Chenery*, 318 U. S. 80, 95; *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123.

II

A. The petitioner was charged and tried as a loyalty and security risk and ultimately removed on loyalty grounds only. Throughout the proceedings the Department's underlying authority was based upon Executive Order 9835 and the McCarran Rider. Since the petitioner was a Foreign Service Officer and, as a consequence, entitled to procedural protections provided by the Foreign Service Act of 1946, it was necessary for the Department to rest its substantive authority in bringing dismissal proceedings against petitioner on the McCarran Rider. Executive Order 9835, of itself, did not vest any additional substantive legal authority in the heads of administrative agencies to discharge an employee.

While the McCarran Rider itself required no procedural

safeguards, the Department's 1949 regulations provided that in executing its responsibilities under that statute its employees would be afforded the same protections as those provided under the Loyalty Program. There can be no doubt that the petitioner was proceeded against under the 1949 regulations of the Department. The original letter of charges was based on those regulations. The Deputy Under-Secretary three times reviewed decisions of the Department of State Loyalty Security Board pursuant to the 1949 regulations. A charge, added by stipulation between petitioner's counsel and the Loyalty Review Board, following a hearing before a panel of that Board, was based on the 1949 regulations.

The 1949 regulations were violated in three respects by petitioner's removal. Contrary to the regulations, the case was re-opened after favorable decisions of the Loyalty Security Board had three times been reviewed and approved by the Deputy Under-Secretary. Secondly, petitioner's timely request for an appeal to and a hearing before the Secretary, as provided by the 1949 regulations, was denied. Finally, as the Secretary's affidavit admits, his decision was not based on the "evidence" in the record, as required by the regulations.

B. There is no case authority to support the Government's startling contention that the Department can initiate, prosecute and conclude a loyalty proceeding against petitioner on the basis of the 1949 regulations and then support the result reached in those proceedings by a later set of regulations, issued in 1951 but which were not published, and of which the petitioner had no notice, and of whose alleged applicability to his case he was not advised until this litigation had reached the District Court. To sustain such a claim would be to go far beyond the limits of any retroactive application of administrative rules which

the courts have tolerated in the past. In the analogous field of criminal procedure, it is a well-accepted principle that laws which effect retroactive charges with respect to substantial procedural rights are unconstitutional because *ex post facto* in nature. *Beazell* v. *State of Ohio*, 269 U.S. 167, 170. See also *Peters* v. *Hobby*, 349 U.S. 331, 344.

The Government's contention that the 1951 regulations applied to petitioner's case is not only distastefully technical, it is also wrong. Section 5(a) of the Federal Register Act requires publication in the Federal Register of "every document or order [of Federal agencies] which shall prescribe a penalty . . ." While there has been no authoritative construction of Section 5(a), it would appear that the Department's 1951 loyalty-security regulations, which prescribe the grave penalty of dismissal from the Government service are of a class covered by the statute. Since the regulations were not published and the petitioner was not given personal notice of them, they cannot apply to his case. *Federal Broadcast System, Inc.* v. *F. C. C.*, 225 F. 2d 560, 568; certiorari denied, 350 U.S. 923; *Hotch* v. *United States*, 212 F. 2d 280, 283 (C.A. 9).

Moreover, even if applicable the 1951 regulations would not alter the result since they too were violated in two respects by the Secretary's dismissal of petitioner. Those regulations required that decisions by the Secretary "shall be reached after consideration of the complete file, arguments, briefs and testimony presented." Quite obviously this requirement is not met by reading an unlawful opinion of the Loyalty Review Board. *Morgan* v. *United States*, 298 U.S. 468, 481; *Kutcher* v. *Gray*, 199 F. 2d 783. In addition, the right of appeal to the Secretary, provided by the 1951 regulations, was denied petitioner.

C. This case is governed by the well-established doctrine

that when a Government official or agency lawfully prescribes rules of procedure they are binding on the Government as well as the citizen. *Bridges* v. *Wixon*, 326 U.S. 135, 153. The principle holds even when the action taken by an administrative official in violation of his own rule is discretionary in nature. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267.

D. The courts below rested their decision upon the unsupported assertion that it was not the intent of Congress that the Secretary of State should bind himself to follow provisions of Executive Order 9835 in dismissing employees under the authority vested in him by the McCarran Rider. The contrary is true. The State Department reported to the Senate that in carrying out its responsibilities under the McCarran Rider it took the view that that statute was subject to procedural limitations and, as a consequence, applied the same procedures which it followed in carrying out its responsibilities under Executive Order 9835. The report of the Tydings Committee received unprecedented attention from the Congress. This case, more than any in the books, is governed by the rule that when Congress re-enacts a statute with knowledge of the administrative construction which has been given it, that construction must be deemed to have been ratified by the Congress. *Labor Board* v. *Gullet Gin Company*, 340 U.S. 361, 366; *Fleming* v. *Mohawk*, 331 U.S. 111, 116.

If more was needed to contradict the assertion of the court below the Congress did not intend that the Secretary of State should bind himself to follow the provisions of Executive Order 9835 in exercising the authority vested in him by the McCarran Rider, it is provided by the Act of August 26, 1950 which replaced the McCarran Rider and provided procedures which very clearly correspond with those of Executive Order 9835. *Cole* v. *Young*, 351 U.S. 536.

ARGUMENT

The Court of Appeals held: (a) that action of the Loyalty Review Board, undertaken without jurisdiction and grounded upon tainted evidence, can supply the sole basis for the lawful exercise of discretion by the Secretary of State, and (b) that the Secretary is free completely to disregard his own procedural regulations and the Department of State's representations to the petitioner as to the manner in which his discretion is to be exercised. Each holding is wrong.

I

The Secretary's Discretionary Action Rested on Invalid Grounds

We show in this section of the brief that the Loyalty Review Board acted without jurisdiction and, furthermore, based its decision on evidence withheld from petitioner in violation of the Fifth Amendment and the Executive Order under which the Board purported to act. The Secretary of State based his decision to discharge petitioner solely on the findings and the opinion of the Loyalty Review Board that were lawless. His decision, accordingly, was invalid.

A. *The Loyalty Review Board Acted Without Jurisdiction.*

It is indisputable that the petitioner could not lawfully be discharged on the basis of the findings and the opinion of the Loyalty Review Board. These were entered following a "post-audit" of the petitioner's case by the Board and a hearing before it, both conducted on the Board's own motion, after a favorable decision by the Department of State. This conduct of the Board was "administrative lawlessness." *Peters* v. *Hobby*, 349 U. S. 331, 345.[17] It is

[17] The suggestion in *Peters* (p. 345) was that the President might have withheld post-audit jurisdiction from the Loyalty Review Board so that

beyond contest that the Loyalty Review Board acted outside its jurisdiction when it reopened petitioner's case and made the findings and announced the opinion on the sole basis of which the Secretary of State purported to act in discharging petitioner.

B. *The Loyalty Review Board's Procedures Violated the Fifth Amendment and the Executive Order*

The Loyalty Review Board not only acted beyond its jurisdiction but the procedures which it followed in petitioner's case violated, in a critical respect, the due process clause of the Fifth Amendment and the provisions of Executive Order 9835 (Appendix A, infra, pp. 51-52). Except for plaintiff's own testimony, the only evidence relied upon by the Loyalty Review Board in reaching its decision consisted of certain purported digests or summaries of conversations between the plaintiff and Jaffe at the latter's hotel room in Washington on April 19 and 20, 1945, and on May 8 and 29, 1945 (R. 49, 65). Agents of the Federal Bureau of Investigation, through recording devices, made records of these conversations between petitioner and Jaffe (R. 68-69, 74). Neither the recordings themselves nor any exact transcription of them were made available to the Loyalty Review Board or to the petitioner (R. 68-69). Purported digests and summaries of the conversations, however, were

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the employee would be "assured that his fate would not be decided by political appointees who perhaps might be more vulnerable to the pressures of heated public opinion." The Loyalty Review Board here directed the Department to issue charges against petitioner shortly after petitioner had been denounced on the Senate floor, the accusing Senator seems to have had advance knowledge of this directive (*supra*, p. 5); and a transcript of the Board's minutes of February 14, 1951, as read on the Senate floor, shows that in the period of its remand of petitioner's case to the Department of State the Board was expressing great concern that the State Department Loyalty Security Board had not recommended the discharge of enough employees; "the program simply does not work in that Department." (98 Cong. Rec. 192-193).

furnished to the Loyalty Review Board by the Federal Bureau of Investigation (R. 68-69). Petitioner's counsel requested, during the hearing before the State Department's Loyalty Security Board, that the recordings or exact transcriptions of them be made available to him, but that request was refused (Tydings Committee Hearings, p. 2457). His request of the Board that petitioner be furnished the summaries of the conversations was also denied (R. 47). The transcript of the one conversation ever made available to petitioner (in a Congressional hearing) shows on its face that it is incomplete and in a substantial part, unintelligible.[18]

Despite his counsel's timely request, petitioner was not permitted to see either recordings of the conversations between himself and Jaffe or summaries and digests thereof (R. 47). The Board was somewhat better informed: It was supplied with summaries and digests of the recorded conversations (R. 68). Recordings of the conversations, however, were not made available to the Board (R. 68). Part IV, Section 1 of Executive Order 9835 expressly directs investigating agencies, at the request of the head of any department or agency of the Executive branch, to make available to such head or his designees ". . . all investigative material and information collected by the investigative agency concerning any employee . . ." As a result of re-

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[18] Tydings Committee Hearings, p. 1404. The stenographer described one passage as "(unintelligible)", added a word in a vain effort to make one sentence intelligible, inserted his own doubts by "?", put in a reference to "Petroff (ph) the new Soviet Ambassador" when no known Soviet Ambassador to China or America has had a remotely similar name, and attributed to petitioner a quotation from an unknown "Award (ph)." He has Service relaying the astounding information (contradicted in the very conversation) that "Hurley's fighting Chungking." The Loyalty Review Board mangles this tapped conversation still further by translating "military plans" into troop dispositions when in context the "plans" related only to political recognition by the military of both Chiang Kai-Shek and the Communists.

spondents' denial (R. 65) of petitioner's allegation that these provisions were not complied with (R. 48), it is established that the Secretary of State, the Loyalty Security Board, or the Loyalty Review Board, requested the F. B. I. to make available to them the original recordings of the conversations between the petitioner and Jaffe, as well as the testimony of the persons who prepared the summaries, digests, and characterizations of these conversations. No such testimony was presented, and respondents, in reply to the request for admissions made of them by the petitioner, admitted that "no recording or exact transcript" of the conversations between petitioner and Jaffe were made available either to the Loyalty Security Board or to the Loyalty Review Board (R. 68). Despite the unavailability of the best evidence, the Loyalty Review Board rested its decision solely on the conversations between petitioner and Jaffe (R. 4, 5, 6, 8, 10, 11). The judges, in this as in other recent instances, did not have the evidence on the basis of which they presumed to judge. *Peters* v. *Hobby*, 349 U. S. 331, 350; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 180. The Board relied on secret information despite the fact that, as respondents admit, no confidential informant was involved, either in recording the conversations or in preparing the summaries of their contents for the use of the Board (R. 68-69). Moreover, the fact that the Federal Bureau of Investigation had made recordings of conversations between petitioner and Jaffe, through the device of a microphone secretly planted in the latter's room, had been revealed not only to the petitioner but to the public sometime before the hearing conducted by the Loyalty Review Board in this case.[19]

1. *The Fifth Amendment.* There can be no conceivable

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[19] Tydings Committee Hearings, pp. 1404, 1915-1916. The Tydings Report was published and made available to the public in July 1950.

reason of security why an accused cannot know and explain what he is supposed to have said. Every reason of rudimentary fairness requires that this purported evidence should have been made available to petitioner. Reliance on this type of secret evidence by the Loyalty Review Board violated both the Fifth Amendment and the Executive Order under which the Board purported to act.

At least when there are no considerations of national security with which to contend, it has been consistently held, either on the grounds of due process or because of requirements of applicable statutory provisions, that in a quasi-judicial or adversary administrative hearing, evidence, which either in whole or in part, forms the basis of the agency's decision, can not be withheld from one of the parties to the proceedings. *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U.S. 292, 300-05; *United States* v. *Abilene and Southern Ry.*, 265 U.S. 274, 289. In such a hearing the parties "must be cognizant of all the facts before the Board * * *." *Gonzales* v. *United States*, 348 U.S. 407, 413. Manifestly, "there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute * * *." *I.C.C.* v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88, 93. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U.S. 63, 69. These principles of law are elemental. They should apply here unless perhaps some countervailing considerations of national security outweigh them. We are able to perceive no such counterweight among the facts of this case, nor have the respondents suggested any.

Bailey v. *Richardson*, 182 F. 2d 46, affirmed without opinion by an equally divided court, 341 U. S. 918, does not require or suggest a different conclusion. There,

the Court of Appeals held that a probationary federal employee could be dismissed on the basis that reasonable grounds existed to indicate that she was disloyal to the Government of the United States following a proceeding before a Regional Loyalty Board in which derogatory information concerning the employee which had been supplied by confidential informants was not made available to her. Whatever may be the force of the reasons for preserving the ambiguity of these "confidential informants," they are inapplicable here. In no conceivable circumstances could the investigative process or the national security be imperiled if petitioner Service were advised of what room-tapped Service was supposed to have said or heard.

Bailey v. *Richardson* contains also strong indications that the Court of Appeals considered the Fifth Amendment inapplicable to proceedings involving the status of Government employees (182 F. 2d at 58-59), at least at times when the "cold war" was raging (182 F. 2d at 51). These principles can no longer, if ever they could, be taken as receiving the support of half the Justices of this Court.

In *Peters* v. *Hobby*, 349 U.S. 331, 338, this Court recognized the delicacy of the problem of equating individual liberty and national security. 349 U.S. at 338. Other opinions of this Court, subsequent to *Bailey* v. *Richardson*, *supra*, indicate that, in view of the stigma which attaches to persons who are dismissed on loyalty or security grounds, in such cases "the need for procedural safeguards seem even greater than in other cases, . . ." *Cole* v. *Young*, 351 U.S. 536, 546. See also, *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 139, 143, 161; *Shaughnessey* v. *Mezei*, 345 U.S. 206, 224-227. This Court has held that due process does extend to protect public servants whose exclusion or dismissal from public employment "is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U.S.

183, 192. Whatever may be the ultimate decision as to the anonymity of "confidential informants" this case presents no such vexing problem. The Loyalty Review Board based its findings and opinion against the petitioner on secret evidence as to which there is no conceivable justification for the secrecy.

An analogy is found in the cases arising under the Selective Service Act. In *United States* v. *Nugent*, 346 U.S. 1, the Court held that a person whose claim for exemption from the draft as a conscientious objector had been denied following a hearing before the Department of Justice in which he had been informed with respect to the general nature and character of the secret unfavorable evidence which had been developed by the Government's investigation, was not deprived of due process. This Court, however, did caution that the registrant was entitled to a "fair resume of any adverse evidence in the investigator's report." 346 U.S. at 6. Subsequently, in *Simmons* v. *United States*, 348 U.S. 397, the Court held that the failure of the Department of Justice to furnish the petitioner, a member of Jehovah's Witnesses who sought exemption as a conscientious objector, with a fair resume of all adverse information in the F. B. I.'s report, deprived him of a "hearing" within the meaning of Section 6j of the Selective Service Act of 1948.[20] See also *Gonzales* v. *United States*, 348 U.S. 407.

The Selective Service cases were decided under the statute rather than on the ground of due process. Yet, as the Court observed in *Simmons* v. *United States, supra*, the failure to furnish petitioner a fair resume of secret derogatory information found in the Government's file deprived him of a "fair hearing" within the meaning of the Selective

[20] 62 Stat. 604, 613, 50 U.S.C. 456(j) as amended 65 Stat. 75, 86, 50 U.S.C. App. (Supp. V) Sec. 456(j).

Service Act, which right, the Court felt, was a "fundamental safeguard." 348 U.S. at 406.

The Court of Appeals for the 9th Circuit recently held, in a case in which the Government did not seek certiorari, *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9), that security regulations enforced by the Coast Guard under the Magnuson Act operated to deny complaining seamen of due process where the seamen were denied security clearance for service on merchant vessels on the basis of confidential information which was not revealed to them in hearings held before a Coast Guard security board. The court balanced out in the seamen's favor the "danger or possible danger to national security" and the "ancient and generally accepted rights of notice and hearing envisioned by the Fifth Amendment." 227 F. 2d 717. The *Parker* result applies *a fortiori* here, where no confidential informants are involved.

2. *The Executive Order.* Apart from the Constitutional infirmity which attaches to its action, the Loyalty Review Board's reliance on secret evidence in this case violates the Executive Order which created the Board and from which it receives its authority. Executive Order 9835 provides in Part II, Section 2, a., that an officer or employee charged with disloyalty "shall have a right to an administrative hearing. * * *" In Part II, Section 2, b., it is required that the accused employee or officer

> shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and as completely as, in the discretion of the employing department or agency, security considerations permit * * *

Part IV, Section 2, of the Executive Order permits the investigative agency to withhold the names of confidential

informants under certain circumstances but forbids the names of such informants to be withheld "where such action is not essential." Part IV, Section 1, of the Executive Order expressly directs investigative agencies at the request of any department or agency of the executive branch to make available to such head or his designees "* * * all investigative material and information collected by the investigative agency concerning any employee * * *."

These provisions of Executive Order 9835, in our view, demonstrate the obvious; the Executive Order "does not contemplate arbitrary secrecy" *Jay* v. *Boyd*, 351 U.S. 345, 358. Administrative reliance on secret evidence, may possibly be justified when national security interests require and the disclosure of such information would be prejudicial to the public interest. *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Shaughnessy* v. *Mezei*, 345 U.S. 206; *Jay* v. *Boyd*, *supra*. Petitioner has already shown, *supra*, pp. 24-26, that there are no such considerations present in the instant case. No confidential informants are involved. There is no legitimate national purpose to be served in refusing the petitioner the right to have access, either to the recordings of the conversations between himself and Jaffe, or to the summaries of those conversations. Respondents requested the F. B. I. to make available the critically important recordings of the conversations, but their request was refused. They were thus required to judge, as petitioners were required to litigate, in the dark. A construction of the Executive Order to permit secrecy for the sake of secrecy alone would be inconsistent with the "traditions and principles of free government," *Jay* v. *Boyd*, *supra* at 357, and convert the "administrative hearing" provided by it into a meaningless form from which even the most elementary canons of fair play had been removed.

C. *The Secretary Relied Solely Upon the Lawless Findings and Opinion of the Loyalty Review Board, and His Action Should be Reversed*

The contemporaneous evidence was unmistakable that petitioner was discharged in automatic consequence of the unlawful action of the Loyalty Review Board. That Board said that it "reversed" the departmental Board; it requested of the Secretary advice "of the effective date of removal of said employee;" its regulations provided "It is necessary that the head of an agency follow the recommendations of the Loyalty Review Board in all cases;" the Department's own regulation advised that upon adverse decision of the Loyalty Review Board "the Department will take prompt administrative action to remove" the employee; its Deputy Under Secretary advised petitioner orally that under the Loyalty Review Board action the Department was "required" to remove petitioner and by letter that "Your employment was terminated solely as a result of the above mentioned finding of the Loyalty Review Board;" the Secretary's press release said, the Loyalty Review Board regulations "are binding on the Department;" and the formal personnel action, said by the Secretary in his affidavit to be correct, described petitioner's removal as "pursuant to the decision of the Loyalty Review Board" (*supra*, pp. 9-11).

It developed only when the former Secretary's affidavit was filed in this action, some 14 months later, that he himself had in this respect a sounder knowledge of his responsibilities than did his Department. That affidavit explains that he recognized at the time that the responsibility of decision was vested in him and that he was not legally bound by the opinion of the Loyalty Review Board [21]

[21] The Court of Appeals for the District of Columbia so held on October 16, 1952. *Kutcher* v. *Gray*, 199 F. 2d 783.

(*supra*, pp. 12-13). The respondents, however, are not aided, for the former Secretary with commendable candor goes on to say—

> 5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board.

In *Peters*, the majority of this Court assumed that the Secretary acted on the basis of the unlawful opinion of the Loyalty Review Board (349 U.S. at 337, 348); the dissenting Justices found nothing to show that this opinion was treated by the Secretary as anything more than a recommendation (349 U.S. at 356). Here there is no such ambiguity. The Court in this case, as it did not in *Peters*, has the Secretary's affidavit that he considered himself free to disregard the Loyalty Review Board decision. But it also knows from that affidavit, as it did not in *Peters*, that the Secretary based his action *solely* on that unlawful decision. His affidavit makes it plain that, had he known the decision of the Loyalty Review Board to be a nullity, he would have had nothing at all to support his removal of

petitioner; this is most simply tested by reading paragraph 5 of the affidavit with the descriptive word "invalid" or "unlawful" inserted before each reference to the finding or opinion of the Loyalty Review Board.

If we put aside the Secretary's violation of his procedural regulations (*infra*, p. 45), the case is this: The Secretary took discretionary action but based it solely upon findings and an opinion of the Loyalty Review Board which represented a lawless assumption of jurisdiction and rested in chief part upon an unlawful use of secret and grossly unreliable evidence.

Executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the courts below. In *Perkins* v. *Elg*, 307 U.S. 325, 349-350, the Court directed that mandamus issue to the Secretary of State to reconsider his discretionary denial of a passport because it had been based upon an error of law as to the applicant's citizenship.[22] In *Securities Comm'n.* v. *Chenery Corporation*, 318 U.S. 80, 95, the Court held that, while the "exercise of administrative discretion" need not be justified "in any particular manner or with artistic refinement," it "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." In *Accardi* v. *Shaughnessy*, 347 U.S. 260, the Court reversed a denial of habeas corpus to an alien whose deportation the Board of Immigration Appeals refused to suspend; the Board's decision was wholly discretionary but was taken in the light of the Attorney General's listing of the alien as an "unsavory

[22] The Court of Appeals for the District of Columbia, following the decisions in *Perkins* v. *Elg* and *S.E.C.* v. *Chenery*, *supra*, has ruled on several recent occasions that the Secretary of State cannot base a discretionary denial of a passport upon invalid evidence or procedure. *Schachtman* v. *Dulles*, 225 F. 2d 938, 943; *Boudin* v. *Dulles*, 235 F. 2d 532; *Kraus* v. *Dulles*, 235 F. 2d 840.

character" who should be deported. *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, held that the Attorney General may not arbitrarily and without a hearing list an organization as subversive, even though the listing is merely a step in procedures looking to discretionary discharge.

In *Perkins* v. *Elg*, *supra*, this Court refused to approve the exercise of the Secretary of State's discretion with respect to the issue of a passport which was based "solely" upon an error of law as to the applicant's citizenship. Similarly, the Court should set aside the discretionary action of the Secretary of State in discharging petitioner "solely" on the basis of lawless findings and opinion of the Loyalty Review Board. The *Elg* doctrine we believe comes down to this: Discretionary action which is based upon unlawful grounds is not in exercise of the discretion which the Congress committed to the official. Here, the former Secretary "did not make any independent determination of my own * * *. I made no independent judgment on the record in this case." He acted, instead, "solely as a result of the findings of the Loyalty Review Board," and "deemed it appropriate and advisable to act on the basis of" those findings. Had the former Secretary then known the Loyalty Review Board findings to be a nullity he could not possibly have "deemed it appropriate and advisable" to carry them into effect; he would in that case surely have found something "which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it." The evidence is indisputable that when the Secretary exercised his discretionary authority to discharge petitioner, he did so under the assumption that the finding and opinion of the Loyalty Review Board, on which he "solely" based the exercise of that discretion, were lawful. As he stated in his affidavit: "There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise

of my responsibilities as Secretary of State to act on it." Accordingly, the Secretary "deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board." (R. 82.) The press release which the Department of State put out when it announced petitioner's dismissal also makes it plain that the Secretary in taking that action did so on the assumption that the finding and opinion of the Loyalty Review Board were lawful (R. 35). That assumption is now conceded to have been erroneous. Equally erroneous is the Secretary's decision to dismiss petitioner solely in reliance on it. We may assume that acceptance of valid findings of another agency can with charity be called the exercise of his own discretion by the Secretary, but if he relies solely upon unlawful and invalid findings there has been no lawful exercise of discretion.

II

The Secretary in Discharging Petitioner Violated His Own Regulations

We show in this part a second and independent ground requiring reversal of the decision below. Validly promulgated administrative regulations, whether procedural or substantive, have the force and effect of law. They bind the administrator who issues them equally with others to whom they apply. The Secretary of State, as we show below, violated his own procedural regulations in discharging the petitioner. That dismissal, accordingly, is invalid.

A. *The 1949 Regulations of the Department*

1. *The Proceedings Were Under the 1949 Regulations.* The petitioner was charged and tried as a loyalty and security risk and ultimately removed on loyalty grounds only. Throughout the proceedings the Department's underlying authority was based upon (a) Executive Order

No. 9835 which as amended by Executive Order 10241 authorizes removal for "a reasonable doubt as to the loyalty of the person"; and (b) the McCarran Rider which authorized the Secretary "in his absolute discretion" to "terminate any employment" (including expressly employees of the Foreign Service), whenever he shall deem such termination necessary or advisable in the interests of the United States."

It was necessary for the Department to rest its substantive authority in bringing proceedings against petitioner, and ultimately dismissing him, on the McCarran Rider as well as the Executive Order. Petitioner was a Foreign Service Officer of the United States. As such, he was entitled to the protection of the Foreign Service Act of 1946, as amended.[23] That statute authorizes the Secretary of State to separate officers from the Foreign Service "for unsatisfactory performance of duty" (22 U.S.C. Sec. 1007) and "for misconduct or malfeasance" (22 U.S.C. Sec. 1008). However, both of the quoted sections require that an officer is not to be separated "until he shall have been granted a hearing by the Board of the Foreign Service." The officer's unsatisfactory performance of duty or his misconduct must be established at that hearing. Cf. *Hammond* v. *Hull*, 131 F. 2d 23, 27, certiorari denied, 318 U.S. 777. The Board of the Foreign Service is a statutory board created by Section 211 of the Foreign Service Act (22 U.S.C. Sec. 826). The petitioner never had a hearing before this Board (R. 71). Executive Order 9835 (Appendix A, *infra*, p. 52) did not vest any additional substantive legal authority in the heads of administrative agencies to discharge employees. It merely established new executive standards and procedures for effecting discharges under whatever independent legal authority existed for those

[23] 60 Stat. 999; 22 U.S.C. Secs. 826, 1007, 1008.

discharges. *Cf.*, *Cole* v. *Young*, 351 U.S. 536, 543-44. The only substantive legal authority which would permit the Secretary to dismiss petitioner without observance of the provisions of the Foreign Service Act was the McCarran Rider. Consequently, the McCarran Rider was a necessary supplement to the Department's authority if it was to proceed against petitioner under the Loyalty-Security regulations.

The Executive Order required specified procedures. The McCarran Rider itself required no procedural safeguards. But the Department's regulations, in Sec. 391.3, provided (*infra*, p. 61) that "in the exercise of this right [of discretionary discharge] the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program."[24] The formal letter of charges preferred against petitioner by the Chairman of the Department Loyalty Security Board, "for the Secretary of State," represented to petitioner in unmistakable terms that the Secretary's determination as to the necessity or advisability of petitioner's discharge "in the interests of the United States" would follow upon the Loyalty Security Board's recommendations as to whether petitioner was a security risk or of doubtful loyalty. (R.).

There can be no slightest doubt that petitioner was in fact proceeded against under the 1949 regulations of the Department.

(a) The charges were based on those regulations (R. 29).

(b) Those regulations were sent petitioner with the letter of charges (R. 29, 30).

(c) The hearing was scheduled under Section 395 of those regulations (R. 29).

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[24] By his letter of September 6, 1950 to the Secretary of State (R. 90), the President in effect directed the Secretary to exercise his absolute discretion under the McCarran rider subject to the procedural guarantees of the Act of August 26, 1950 (5 U.S.C. Sec. 22-1).

(d) The Department of State Loyalty Security Board noted that "the issues here are (1) loyalty, and (2) security risk" (R. 23).

(e) The Deputy Under Secretary, who was authorized to review this determination by Sections 395.6 and 396.7 of the 1949 regulations, on at least three occasions did so and approved the Loyalty Security Board decision (R. 33, 42-43, 63).

(f) The Loyalty Review Board post-audit, hearing and "reversal" was asserted only under the Executive Order.

(g) Finally, the stipulation entered into by the petitioner's attorney and the Chairman of the Loyalty Review Board, after evidence had been taken at the hearing before the Board, agreed upon an additional charge to be added to the Department's original charges "under section 393.1a of its regulations." (R. 32). Section 393.1a refers to the 1949 Regulations and Procedures of the Department of State (Appendix A, *infra*, p. 63).

Not until the Government's brief was filed with the District Court was there any suggestion that petitioner was removed only under the McCarran rider, and quite independently of the Executive Order and of the Department's procedural regulations. The respondents' argument, although substantially accepted by the courts below, puts the Secretary and the Department in the unattractive position of promising to petitioner that his case was being heard on specified charges and under described procedures and subsequently urging to the courts that both the charges and the procedures were quite immaterial to his removal.

The Government's argument, moreover, is squarely contradicted by every relevant word of the record. Indeed, it flies in the teeth of the affidavit of the former Secretary who says that he acted both under the Executive Order and the McCarran rider, and nowhere asserts that petitioner

was removed only "in the interests of the United States" under the McCarran Rider (R. 82). Instead, the Secretary twice expressly refers to the fact that his determination to discharge petitioner was undertaken pursuant to responsibility vested in him under "both" Executive Order 9835 and the McCarran Rider (R. 82). And in formally separating petitioner from the Department of State, the Secretary's Division of Foreign Service Personnel cited as termination authority for petitioner's discharge both Executive Order 9835 and the McCarran Rider (R. 84-85).

Whether or not the Secretary of State could otherwise have removed petitioner under the McCarran rider alone without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend, with respect both to the McCarran rider and the Executive Order, the procedural protections of his regulations. The Court "in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196. The courts below, in assuming that the Secretary exercised his discretion in a vacuum and without reference to the Departmental procedures under which petitioner was charged and his case heard, have followed the Government briefs in preference to the record.

2. *The 1949 Regulations were Violated.* The 1949 regulations, under which petitioner was charged and tried, were in three respects violated by his removal.

(a) Under Sec. 395.6, a favorable decision of the Loyalty Security Board was to be reviewed by the Deputy Under Secretary and, if approved, the case was to be closed. The petitioner three times received a favorable decision from the Loyalty Security Board which was reviewed and approved by the Deputy Under Secretary. Under the regula-

tions, his case was closed. In fact, it was three times re-opened by an exercise of "post-audit" jurisdiction by the Loyalty Review Board, and the Secretary finally intervened in the case solely on the basis of its final decision.

(b) Both Executive Order 9835 (Part II, Sec. 3) and the regulations (Secs. 395.1 and 396.1) provide for an appeal to and a hearing before the Secretary or his designee before separation from employment; petitioner's request for an appeal to the Secretary made a few hours after notice of the Loyalty Review Board decision, was denied.

(c) The Secretary's decision following a hearing before him upon an appeal, as permitted by Secs. 395.1 and 396.1, quite clearly must be on the basis of the evidence "contained in the record or submitted at that hearing" (Sec. 396.12). The Secretary's affidavit concedes his failure to "read the testimony taken" or to "make any independent determination" as to petitioner's loyalty on the basis of "the evidence submitted . . ." (R. 82).

B. *The 1951 Regulations of the Department*

It was not until this case reached the District Court that the Government advanced the claim that the applicable regulations upon which petitioner's dismissal was based were those of 1951. The claim is somewhat startling since it was not until that moment that petitioner knew that the 1951 regulations even existed. We show here that they cannot be applied retroactively and without notice, and that even if applicable they, too, were violated.

1. *The 1951 Regulations Cannot be Applied to This Proceeding.* The Government would have the Court hold that the Department of State can initiate, prosecute and conclude a loyalty-security proceeding on the basis of one set of regulations and then support the result reached in those proceedings by a later set of regulations, which were not

published, and of which the petitioner had no notice and of whose alleged applicability to his case he was not advised, until this litigation reached the District Court.

It is true, of course, that not all administrative rules having retroactive application are either invalid or unfair. *Helvering* v. *Reynolds*, 313 U.S. 428; *Securities Comm'n.* v. *Chenery*, 332 U.S. 194, 203. Where a statutory purpose may be defeated unless permitted, an administrative rule may be given retroactive effect. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619. The usual test applied by the courts when called upon to sanction retroactive application of an administrative rule is a determination whether such application will "work hardship upon [petitioner] altogether out of proportion to the public end to be accomplished." *N.L.R.B.* v. *Guy F. Atkinson*, 195 F. 2d, 141, 149 (C.A. 9); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 534. It may, therefore, be within the power of an administrative agency to modify its procedural rules so as to have retrospective application to a case already pending before it under circumstances where "the ends of justice require it." *N.L.R.B.* v. *Monsanto Chemical Company* 205 F. 2d 763, 764 (C.A. 8).

However, the presumption is against retroactive rule making. Usually, it is held not to be within the powers delegated to the agency unless "the legislative intention to that effect unequivocally appears." *Miller* v. *United States*, 294 U.S. 435, 439. The presumption holds with especial force when retroactive application of a rule would alter the rights and duties of parties who may have relied on its predecessor. *United States* v. *Macdaniel*, 32 U.S. 1, 15. To say that the procedural standards which the Secretary of State was obliged to follow in this case were those contained in the 1951 regulations and not those imposed under the 1949 regulations would seem to go far beyond the bounds of any ret-

roactive application of administrative rules and regulations which the courts have tolerated in the past. Loyalty proceedings are nominally civil in nature; but they bear a disquieting resemblance to criminal proceedings in the consequences which are visited upon the employee who is dismissed under them. *Wieman* v. *Updegraff*, 344 U.S. 183, 191. In *Peters* v. *Hobby*, 349 U.S. 331, 344, this Court recognized that a limitation on the Loyalty Review Board's "review power to adverse determinations was in keeping with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not." It seems, therefore, appropriate to note that laws which would effect retroactive changes with respect to substantial procedural rights are unconstitutional because *ex post facto* in nature. *Beazell* v. *Ohio et al.*, 269 U.S. 167, 170; *Kring* v. *Missouri*, 107 U.S. 221, 232; *Putty* v. *United States*, 220 F. 2d 473, 476 (C.A. 9).

The respondents concede that the 1951 Department of State Loyalty and Security Regulations were not published in the Federal Register.[25] The Government attempts to excuse this failure of publication on the grounds that the 1951 regulations dealt only with procedures applicable to Government employees and, it is respondents' view, were thus exempt from the requirements of publication found in the Federal Register Act [26] and the Administrative Procedure Act.[27]

The contention is not only distastefully technical but is also wrong. Section 5 of the Federal Register Act (49 Stat. 501, 44 U.S.C. Sec. 305(a) provides:

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[25] Cf. *Newman, Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 Har. L. Rev. 929, 933 (1950): "in effect, there has been an unwitting conspiracy to exclude from the Federal Register a huge quantity of documents that have general applicability and legal effect."

[26] 49 Stat. 500, 501, 44 U.S.C. Sec. 305.

[27] 60 Stat. 238, 5 U.S.C. Sec. 1002.

"(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided, That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.*" (Italics supplied.)

On its face the italicized clause would seem to cover loyalty-security regulations such as the 1951 regulations of the Department. Regulations of that kind prescribe one of the gravest of penalties, i.e., dismissal from Government employment and loss of personal and professional reputation as well as loss of retirement, pension and other financial penalties. There has been no authoritative construction of the requirement of Section 5 of the Federal Register Act that administrative orders or documents which prescribe penalties must be published. See, however, *Borak v. Biddle*, 141 F. 2d 278, certiorari denied, 323 U.S. 728, in which it was held that a Civil Service regulation which extended the probationary period (during which summary dismissal was permitted) for employees from six months to one year had no binding effect as to an employee who had not been given notice of the amended regulation, which had not been published in the Federal Register, prior to his dismissal.

The 1951 loyalty-security regulations of the Department of State "prescribe a penalty." Under the Federal

Register Act, they must be deemed "to have general applicability and legal effect" and thus must be published. Since they were not, and since petitioner was not given personal notice of them, as the Federal Register Act (49 Stat. 502, 44 U.S.C. Sec. 307) expressly provides, they can have no application to his case. *Borak* v. *Biddle*, *supra*; *Federal Broadcast System, Inc.* v. *F. C. C.*, 225 F. 2d 560, 568, certiorari denied, 350 U.S. 923; *Hotch* v. *United States*, 212 F. 2d 280, 283 (C.A. 9).[28]

The Government's argument that the 1951 regulations need not have been published, nor any notice given petitioner, is at the best an undignified one. It is made no more graceful by the fact that the 1949 regulations were meticulously forwarded to petitioner along with his letter of charges (R. 29), and thus established the whole framework of the proceedings.

It would have been on the whole less arbitrary for the Department of State to have given the petitioner no notice at all of the rules and procedures by which it intended to hear and determine his case, than to have required him to

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[28] It is probable, although unnecessary to decide, that the Administrative Procedure Act also required the Department to publish its 1951 loyalty security regulations in the Federal Register. Section 3 of that statute (60 Stat. 238, 5 U.S.C. Sec. 1002) exempts from publication "any matter relating solely to the internal management of an agency". It is by no means clear that the 1951 regulations of the Department fall within the excepted category. Apart from the public interest in regulations by means of which the loyalty and security of Federal employees are attempted to be insured, the 1951 regulations went beyond matters relating solely to the internal management of the Department of State but referred to, and in part depended on, operations and decisions of the Executive Branch of the Government as a whole, as well as of the Civil Service Commission and the Loyalty Review Board. Moreover, both the Senate and House Committees, in commenting on the exception to publication allowed matters relating solely to the internal management of an agency, noted that the exception should "not be construed to defeat the other provisions of Section 3 [requiring publication] or to permit withholding of information as to operations which remaining provisions of the section or of the whole bill require to be public or publicly available." S. Doc. 248, 79th Cong. 2d Sess., 1946, 198, 255.

guess at his hazard as to the controlling procedures. Instead, the Department of State tried him under one set of regulations and then the Department of Justice seeks to inform him, after the termination of the proceedings, that a different set of secret regulations were controlling in his case. We find it difficult to believe that this contention can seriously be urged upon this Court. If the Government continues to press the contention, the Solicitor General should be reminded that secret and retroactive application of administrative rules finds no sanction in our law. No more can it find support in common sense, or in common decency.

2. *The 1951 Regulations Were Themselves Violated.* Even if the Government could somehow persuade the Court that petitioner can be proceeded against under the 1949 regulations, and after dismissal be told that the case was really proceeding under a retroactive application of secret 1951 regulations, it would have gained nothing. For petitioner's discharge violated the 1951 regulations equally with those of 1949.

(a) Section 391.3 of the 1951 regulations make them applicable to action under the McCarran Rider. Section 393.1 of those regulations provides that decisions by the Secretary as well as the Loyalty Security Board "shall be reached after consideration of the complete file, arguments, briefs and testimony presented." Quite obviously, this requirement is not met by reading and relying solely upon an unlawful opinion of the Loyalty Review Board, while disregarding all other material in the case, as the former Secretary candidly admits he did (R. 82). Section 393.1 incorporated in an administrative rule the principle enunciated by this Court in *Morgan* v. *United States*, 298 U.S. 468, 481, that "the one who decides must hear." That principle has received recent application in the Loyalty Security field. *Kutcher* v. *Gray*, 199 F. 2d 783. The Court of Appeals for the District of Columbia there observed that under

the Executive Order which provided for the removal of employees on grounds relating to loyalty, final decision as to removal on those grounds rests with the head of the department or agency whose duty it is to order removal if grounds exist. The Court held that where the Administrator of the Veterans' Administration removed an employee on the basis solely of a finding by the Loyalty Board of the Veterans' Administration that the petitioner had been a member of an allegedly subversive organization, the Administrator had not complied with his duty "to impartially determine on all the evidence whether there were reasonable grounds for belief that Kutcher was disloyal to the Government of the United States." 199 F. 2d at 787. The decision applies *a fortiori* here, for the Administrator, in contrast to the Secretary, at least chose for his reading an opinion which was rendered lawfully. The Secretary's dismissal of petitioner under the McCarran Rider on the sole basis of the lawless opinion of the Loyalty Board, without considering the complete "file, arguments, briefs and testimony presented," as the basis for that decision, was a failure to comply with a similar duty to hear and decide which, in this instance, the Department's procedural rules put upon him.

(b) The 1951 regulations were violated in one other respect by the Secretary's dismissal of petitioner. Section 396.11 and 396.12 allow an appeal to the Secretary from a decision requiring removal from employment. That right of appeal was denied petitioner although requested of the Secretary (R. 72).

C. *The Secretary of State Is Bound By His Own Regulations.*

If a Government official or agency lawfully prescribes rules of procedure, they are binding on the Government as well as the citizen. The Secretary of State promulgated

regulations which, in the applicable 1949 version, promised (a) that a case was closed upon approval by the Deputy Under Secretary of favorable decisions; and (b) that there could be appeal to and hearing before the Secretary before action upon an unfavorable decision; and (c) that decision would be based on the "evidence" in the record. Having done so, he was bound by those regulations and could not lawfully ignore them, even though his substantive decision lay within his discretionary authority. *Bridges* v. *Wixon*, 326 U.S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 629; *Bilokumsky* v. *Tod*, 263 U.S. 149, 155. "As long as the regulations remain operative," the Secretary "denies himself the right to sidestep the Board," *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267, to intervene to reopen and reverse a case which under his regulations is closed, or summarily to discharge an employee who by his regulations is entitled to an appeal.[29]

The settled principle that Government officials are bound

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[29] The principle has been frequently applied by the courts of appeal. The Second Circuit, for instance, requires that the discretionary power to suspend deportation be exercised in accord both with the procedural regulations, *United States ex rel Weddeke* v. *Watkins*, 166 F. 2d 369, 371, certiorari denied, 333 U.S. 876, and with the established practice, *United States* v. *McGrath*, 181 F. 2d 839, 841, dismissed as moot, 340 U.S. 940. The Sixth Circuit has invalidated a war surplus sale contract provision which forbade resale, contrary to the governing regulation, which "binds the administrator himself equally with others." *School District 2 Fractional* v. *United States*, 229 F. 2d 681, 685. The Court of Appeals for the District of Columbia Circuit recently held that the Secretary of Interior is bound by his own regulation promulgated pursuant to the Mineral Leasing Act so long as it remains in effect, since it has "the force of law." *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43. In other cases the courts of appeals have enforced an alien's right to procedural protection held out by administrative regulations governing discretionary action. *United States* v. *Perkins*, 79 F. 2d 533 (C.C.A. 2); *Sibray* v. *United States*, 282 Fed. 795 (C.C.A. 3); *Mah Shee* v. *White*, 242 Fed. 868 (C.C.A. 9). In two decisions, courts have gone so far as to forbid the agency to depart from its usual *practice*, even in the exercise of discretionary action. *N.L.R.B.* v. *Mall Tool Co.*, 119 F. 2d 700, 702 (C.C.A. 7); *Berchem* v. *R. F. C.*, 199 F. 2d 922 (Em. Ct. App.).

by their own validly promulgated regulations has no relation to the proposition upon which the Government relies. It is of course quite beyond argument that when an administrative agency properly exercises the discretion bestowed on it by the Congress to dismiss its employees, the courts will not substitute their judgment in these matters for that of the administrative agency. *Scher* v. *Weeks*, 231 F. 2d 494, certiorari denied 351 U. S. 973; *Williams* v. *Cravens*, 210 F. 2d 874, certiorari denied, 348 U. S. 819; *Eberlein* v. *United States*, 257 U. S. 82; *Keim* v. *United States*, 177 U. S. 290. The principle has nothing to do with this case. Here the so-called discretion of the Secretary was exercised in flat violation of his own regulations and on the sole basis of an unlawful opinion of the Loyalty Review Board.

Dismissal in disgrace as a loyalty or security risk from the service of the Government of the United States is a penalty which equals, indeed exceeds, in severity the imposition of a deportation order. In both cases "meticulous care must be exercised lest the procedure by which" the penalty is inflicted "not meet the essential standards of fairness" *Bridges* v. *Wixon*, 326 U. S. 135, 154. Those "essential standards" are hardly met when petitioner is formally assured of the protections offered by valid regulations only to have them wholly ignored when their assurances prove inconvenient to the Department.

Nor can the respondents justify the failure to observe procedural fairness in dismissing petitioner by relying on the unsupported dictum of the court below "that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk" (R. 98). Following his discharge from the Foreign Service, petitioner has been unable to obtain employment with earnings equal to what he was making at the time of his dismissal; all his life insurance was automatically cancelled and his

insurance company refused to insure his life; and housing accommodations also were denied petitioner and his family solely because of the unfavorable publicity which resulted from his discharge (R. 74). These facts portray the magnitude of the infamy which attaches in the public mind to a person dismissed from the service of his Government under the circumstances presented here. The public, unlike the Court of Appeals, cannot be expected to make technical distinctions between dismissals "in the interest of the United States" and those made under the Loyalty Program. Dismissal under either, as petitioner's experience shows, is one of the gravest penalties, in the terms of loss of good name and public esteem, which can be inflicted upon an individual.

D. *The Congress Confirmed the Department's Procedure Under the McCarran Rider*

The courts below did not follow the Government's argument in favor of the secret 1951 regulations but instead rested their decision upon the bald assertion that "It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188" (R. 88, 98).

The assertion is wholly unsupported and is contradicted by compelling evidence to the contrary. The State Department in the Spring of 1950 submitted to the Tydings Committee a comprehensive report on its procedures. This report is reproduced *in extenso* in the report of the Tydings Committee (S. Rept. 2108, 81st Cong. 2d Sess., pp. 14-18); the Committee in this respect said that it was "fully satisfied" with the departmental procedures (pp. 18, 23). The State Department report explained with wise insight the reasons for its decision; it specifically stated (pp. 15, 16):

> After enactment of the McCarran Rider the Department did not contemplate that the legislation required

> or that the people of this country would countenance the use of "Gestapo" methods of harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo * * * Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran Rider as an additional standard for dealing with security problems in the Department * * * In [its] considered view the McCarran Rider was subject to procedural limitation. The McCarran Rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims * * * The unique powers conferred on the Department as a result of continuous reenactment of the McCarran Rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive Order and under the McCarran Rider.

The report of the Tydings Committee received an unprecedented amount of attention from the members of the Congress. The report was the subject of ten days of extended and heated debate on the floor of the Senate.[30] Senator McMahon, a member of the Tydings Committee, called the attention of the Senate to the fact that the State Depart-

[30] The debate in the Senate over the Tydings Report began even before the formal filing of the report with that body. 96 Cong. Rec. 10396-98, 81st Congress., 2d Sess., July 17, 1950. From that day through July 27, 1950, hardly a day passed without the Senate being drawn into discussion and debate over the report. *Ibid;* pp. 10493-95, 10568-70, 10686-89, 10691-96, 10697-10717, 10773-92, 10798-10803, 10805-10820, 10837-48, 10859-60, 10912-10960, 11172-83. On four days the Senate business was devoted almost entirely to the Tydings report. Some 45 Senators took a direct part in the debate; 12 of these were members of the Senate Committee on Appropriations which, of course, had primary responsibility in reporting out the State Department appropriation acts of which the McCarran Rider was a part. Four formal votes were taken in the Senate during the period the Tydings report was before it for consideration. In addition, three resolutions proposed by the minority were voted upon.

men, in its use of the McCarran Rider, applied the procedural protections of its regulations, 96 Cong. Rec. 10809. The McCarran Rider was, however, reenacted without change. 64 Stat. 768; 65 Stat. 575. The rule is settled that when Congress reenacts a statute with knowledge of the administrative construction which has been given it, that construction must be deemed to have received Congressional confirmation. *Labor Board* v. *Gullet Gin Co.*, 340 U.S. 361, 366; *United States* v. *Dakota-Montana Oil Company*, 288 U.S. 459, 466; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 557; *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 492; *Fleming* v. *Mohawk*, 331 U.S. 111, 116; *Brooks* v. *Dewar*, 313 U.S. 354, 361; *Isbrandtsen-Moller Company* v. *United States*, 300 U.S. 139, 147; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301; *Mitchell* v. *United States*, 267 U.S. 341, 346; *Wells* v. *Nickles*, 104 U.S. 444, 447.

We do not believe, even were there no guidance whatever toward the legislative intent, that any court is entitled simply to assume that the Congress forbade the McCarran Rider discharge authority to be exercised pursuant to procedures designed to offer minimum protection to the rights of accused employees. Such an assertion by the courts below seems to us to pervert the standards both of human conduct and of statutory construction. But, as we have shown, their error is even more sweeping. The courts below did not have a clean slate to write on. The Congress was clearly informed and obviously knew that the State Department was applying Executive Order procedures to McCarran Act removals; with that knowledge, and without objection from any member of the Congress, it twice reenacted the McCarran Rider without change.

Finally, if more be needed to contradict the assumption of the courts below, it is provided by the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. Section 22-1 et seq.) This

permanent legislation replaced the McCarran Rider and provided procedures which very closely corresponded with those of Executive Order 9835. See *Cole* v. *Young*, 351 U.S. 536.

Conclusion

For the reasons stated, petitioner respectfully requests that this Court reverse the judgment of the Court of Appeals to the extent that the court below affirmed the District Court in its denial of petitioner's motion for summary judgment and its grant of respondents' cross-motion.

Respectfully submitted,

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January 1957.

APPENDIX A

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The "McCarran Rider" to Appropriation Acts of the U. S. Department of State (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, 65 Stat. 575):

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Notes: (1) In the first of the cited provisions, for the Fiscal Year 1947, the final period as quoted above was a comma with the following clause added—

> "but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

(2) In the first three of the cited provisions, in place of the phrase "during the current fiscal year," there appeared the phrase "on or before June 30, [1947, 1948 or 1949]."

Executive Order No. 9835 (12 Fed. Reg. 1935):

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 611), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement

between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

Part II—Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as in the discretion of the employing department or agency, security considerations permit and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal to the head of the employing department or agency or to such person or persons as may be designated by such head under such regulations as may be prescribed by him, and the decisions of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three im-

partial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or

agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis

of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V—Standards.

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of

the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed

services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

The White House
March 21, 1947.

Executive Order No. 10241 (16 Fed. Reg. 3690):

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 9A of the act approved August 2, 1939 (5 U.S.C. 118), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government", be, and it is hereby, amended to read as follows:

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

The White House,
April 28, 1951.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted March 11, 1949:

391 *Authority and General Policy*

391.1 The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk.

391.2 The necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons, and the obligation to protect employees and applicants from unfounded accusations of disloyalty, have been recognized in Executive Order 9835 which establishes the President's Loyalty Program. The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in Title 5, Chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State. So far as it relates to the handling of loyalty cases, the statement of procedure below is promulgated in accordance therewith.

391.3 In addition, the Secretary of State has been granted by Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the inter-

ests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

392 *Loyalty Standard*

Part V of Executive Order 9835 provides as follows:

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as to-

talitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

393 *Security Principles of the Department of State*

393.1 *Categories Constituting Security Risks*

As used herein, an officer or employee constitutes a security risk when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified

information as to compel the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

393.2 *Determining a Security Risk*

In determining whether or not a person is a security risk, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to above, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violation of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of sec. 393.1.

393.3 *Considerations in Weighing Evidence*

393.31 A former course of conduct or holding of beliefs will be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.32 If a reasonable doubt exists as to whether the person falls into one of the categories listed in sec. 393.1, the Department will be given the benefit of the doubt, and the person will be deemed a security risk.

394 *Prehearing Procedures of the Loyalty and Security Board*

394.1 *Loyalty Cases*

394.11 All cases in which a report of a loyalty investigation is received shall be referred for consideration to the LSB which shall take action on every case so referred. The LSB shall examine the report of investigation and may request further investigation if such action appears to be necessary. Whenever practicable, such request shall be specific as to the additional information required.

394.12 The LSB shall consider the report of investigation in the light of the loyalty standard as set forth in sec. 392 and shall determine whether such report warrants a finding clearly favorable to the individual or appears to call for further processing of the case with a view to possible removal action. If the LSB reaches a clearly favorable conclusion, it shall so determine and recommend to the Assistant Secretary—Administration that favorable action be taken. If the LSB determines that such report does not warrant a finding clearly favorable to the individual, the procedures set forth in secs. 394.13, 394.14, 394.15, 394.16 shall be followed.

394.13 In all cases in which the evidence indicates that removal action may be warranted, the LSB shall serve the officer or employee with a notice in writing which shall state the nature of the charges against him in factual detail, setting forth in particular the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation.

394.14 The officer or employee shall be informed of his right to answer the charges in writing, under oath or affirmation, within a reasonable period of time, not less than 10 calendar days from the date of receipt by the employee of the notice; of his right to have an administrative hearing on the charges before the LSB not less than 15 calendar days before such hearing is to take place; and of his right to appear before the LSB personally, to be represented by counsel or representative of his own choosing, and to present evidence in his own behalf.

394.15 The notice shall be given to the employee at least 30 calendar days in advance of the effective date of the proposed removal action, except as provided in the Federal Personnel Manual. It shall state the work and pay status in which he will be carried during the notice and until the determination of the LSB, and the authority or authorities (Executive order and statute, if applicable) under which the notice is sent.

394.16 After giving the employee the foregoing notice, the LSB shall proceed as follows:

a. If the incumbent or excepted employee does not reply to the notice within the time specified by the LSB, the LSB shall consider the case on the complete file and recommended action to the Assistant Secretary—Administration.

b. If the incumbent or excepted employee answers the charges in writing but does not request a hearing, the LSB shall then consider the case on the complete file (including such answer) and recommend action to the Assistant Secretary—Administration.

c. If the incumbent or excepted employee requests a hearing before the LSB, a time and place for such hearing shall be set by the LSB, as convenient to the employee as circumstances permit and within the times specified in the notice of hearing referred to in secs. 394.13, 394.14 and 394.15 above, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense. This hearing shall

be conducted in accordance with the provisions of sec. 395.

394.2 *Security Cases.*

394.21 The LSB shall take action in the cases of all officers and employees which are referred to it by the responsible authorities of the Department.

394.22 The LSB shall make a determination in such cases that the officer or employee concerned shall be given the right of a hearing to determine whether his continued employment constitutes a security risk to the Department or whether, on the basis of the record presented, the continued employment of the officer or employee does not constitute a security risk to the Department.

394.23 If the LSB determines that the officer or employee should be given the right of a hearing, the procedures set forth in secs. 394.13-394.16 and 395, shall be followed.

395 *Hearing Procedure of the Loyalty and Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in sec. 394, before any officer or employee of the Department of State or of the Foreign Service of the United States is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him and be granted the right to a hearing before the LSB and an appeal to the Secretary of State, or his designee or designees. If he is charged with disloyalty, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interests of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the LSB may deem proper.

395.3 *Hearings*

395.31. The hearing shall be private and shall be attended only by the members of the LSB, other appropriate Government officials connected with the adjudication process, the officer or employee, his counsel or representative and the witness who is testifying.

395.32 The Chairman of the LSB shall preside; the officer or employee shall be permitted to appear personally, and either by himself or by his representative or counsel to present evidence in his own behalf, through witness or by affidavit.

395.33 Testimony shall be given under oath or affirmation. Members of the LSB may ask such questions of him and his witnesses as they may desire.

395.34 A stenotypist record will be made of the proceedings by a person or persons designated by the LSB and no other transcript shall be made. A copy of the transcript will be provided to the officer or employee upon request.

395.35 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the record of the hearing has been reduced to writing, the LSB will convene in executive session to reach a decision.

395.42 In its consideration, the LSB shall be governed by the loyalty standard provided in sec. 392 or the security principles provided in sec. 393, depending upon the nature of the case and the evidence submitted. After examination of the evidence and following any desired discussion, the vote shall be by ballot and the decision by majority vote. The vote by each member shall be recorded.

395.43. In arriving at its decision, the LSB shall take into consideration the fact that the employe may have been handicapped in his defense by the non-disclosure

to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the LSB shall be one of the following:

a. The LSB recommends that, on the evidence submitted, the officer or employee should not be separated from employment under the loyalty standard referred to in sec. 392, or as a security risk under the security principles provided in sec. 393, and further recommends either that the case be closed or that further investigation be made along specific lines, with or without suspension; or

b. The LSB recommends that the officer or employee be separated from employment for disloyalty under the loyalty standard referred to in sec. 392 and as a security risk under the security principles provided in sec. 393; or

c. The LSB recommends that the officer or employee be separated from employment as a security risk under the security principles provided in sec. 393.

395.52 If the recommendation of the LSB is for separation from employment, it may, depending upon the nature of the case, the evidence presented, or consideration of mitigating circumstances, suggest that the officer or employee be dismissed or that, upon his request, he be permitted to resign.

395.53 The decision of the LSB shall be made in writing and shall be signed by the members of the LSB. It shall state the action taken and shall be made a permanent part of the record. The record shall be classified as secret and transmitted to the Assistant Secretary—Administration.

395.6 *Action by Assistant Secretary—Administration*

Upon receipt of the record including the decision of the LSB, the Assistant Secretary—Administration

shall take whatever action he deems appropriate with respect thereto and may, if the situation warrants, suspend the officer or employee pending further investigation or any appeal which may be made. If the decision of the LSB is favorable to the officer or employee concerned and is concurred in by the Assistant Secretary—Administration, he will so notify the officer or employee.

396 *Appeals*

396.1 *Notification of Separation and Right of Appeal*

396.11 If the decision is for separation from employment for disloyalty and as a security risk, or only as a security risk, the officer or employee shall be so notified by the Assistant Secretary—Administration and advised in writing of his right to appeal to the Secretary of State, or his designee or designees, within 10 calendar days after receipt of such notification. In those cases where separation from employment is contemplated only on the grounds of a security risk, the notice will state that the officer or employee is not considered disloyal by the Department.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary, or his designee or designees, will afford the officer or employee a hearing on the record at a date not earlier than one week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary, and/or his designee or designees, the officer or employee and a single counsel or representative of his own choosing. The officer or employee shall be permitted to appear personally, and either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned. A stenotypist record will be made of the proceedings

and a copy of the transcript will be provided to the officer or employee upon request.

396.2 *Decision Against Removal*

396.21 If, as a result of such hearing, the Secretary of State decides that there is insufficient evidence to support removal under the loyalty standard referred to in sec. 392, and under the security principles referred to in sec. 393, he may direct that the case be closed, that further investigation be conducted, or that the officer or employee be dismissed or permitted to resign as a security risk.

396.22 If the Secretary of State decides that there is insufficient evidence to support removal under the security principles referred to in sec. 393, he may direct that the case be closed or that further investigation be conducted.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing.

396.3 *Decision for Separation from Employment*

396.31 If, as a result of such hearing, the Secretary of State decides that the officer or employee should be separated from employment, the officer or employee will be so notified in writing. In such event the Secretary of State may, in addition, direct his suspension if he is not already suspended or may permit him to resign.

396.32 If the decision is that the officer or employee should be separated from employment for disloyalty and as a security risk, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 days after the receipt of the notice in the case of persons living within the continental United States and within 30 days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Advisory Recommendation by the Loyalty Review Board*

If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the loyalty standard referred to in sec. 392, the Department will take prompt administrative action to remove him from employment.

396.5 *Action on Findings of the Loyalty Review Board*

396.51 If, after hearing an appeal from a decision that an officer or employee should be separated from employment for disloyalty and as a security risk, the Loyalty Review Board makes a finding that reasonable grounds do not exist for the belief that the officer or employee is disloyal, the Secretary of State, or his designee, may:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Permit the officer or employee to resign from the Department; or

c. Terminate the employment of the officer or employee under the authority conferred by Title I of the Appropriations Act of 1948 (McCarran Rider) or other appropriate authority.

396.52 Prior to final action, the Secretary of State, or his designee, may refer the case to the LSB and obtain a recommendation whether the officer or employee should be separated from employment as a security risk.

396.6 *Cases Involving Separations Not Subject to Review by the Civil Service Commission*

In the event of a decision that an officer or employee should be separated from employment only as a security

risk and the case does not fall within the category of cases subject to review by the Civil Service Commission, the Secretary of State will normally permit the officer or employee to resign from the Department in lieu of terminating his employment. This policy is adopted since no forum will exist outside the Department in which the officer or employee may affirmatively establish his loyalty.

396.7 *Decision that Employee is Loyal and Not a Security Risk*

If the Assistant Secretary—Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted May 4, 1951, and revised September 21, 1954:

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F.R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of pro-

cedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the Board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with

the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of

the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of Government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of Section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standards and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks

to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organi-

zations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sec-

tions 394.13 through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authori-

ties cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213; Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption

should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2(a)(2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only.*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the

Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in section 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyal Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal.*

As indicated in section 394, before any officer or employee of the Department of State is removed from em-

ployment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyal Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyal Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the

interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will not include all material in the file of the case, in that it will not include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the haring.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witness as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyal Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing; but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

(5-4-51)

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyal Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principle provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyal Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall not be a part of the written decision and shall in no instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty

grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances, the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

396.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Se-

curity Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national se-

curity under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable grounds do not exist for belief that the officer's or employee's removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds exist for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt

of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds exist for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board that board finds that reasonable grounds do not exist for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE, PETITIONER

v.

JOHN FOSTER DULLES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 85–88) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 67–73) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956. The petition for a writ of certiorari was filed on September 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 103 of Public Law 188, 82d Congress, conferred upon the Secretary of State, in his absolute discretion and notwithstanding the provisions of any other law, the authority to terminate the employment of any officer of the Foreign Service. The question is whether, in the exercise of this statutory authority, petitioner was validly removed by the Secretary of State from the Foreign Service of the United States.

STATUTES AND REGULATIONS INVOLVED

Section 103 of Public Law 188, 82d Congress (The Department of State Appropriation Act, 1952, 65 Stat. 575, 581) and Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1) are set forth in the Appendix, *infra,* pp. 16–18. The regulations of the Department of State in effect at the time of petitioner's dismissal (adopted May 4, 1951, revised September 21, 1951) are set forth in the Appendix, *infra,* pp. 19–41.

STATEMENT

On March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State, acting under Executive Order 9835, 12 Fed. Reg. 1935, notified petitioner that a hearing had been scheduled to consider charges against him,[1] with a view to making

[1] The charges against petitioner were that (R. 28–30):

"* * * within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of or in sympathetic association with the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States

a recommendation to the Secretary of State as to whether or not his employment should be terminated in the interest of the United States, pursuant to Section 104 of Public Law 179, 81st Congress[2] (R. 28–30).

Following extensive hearings attended by petitioner and his counsel, the State Department Loyalty Security Board, on October 6, 1950, concluded that reasonable grounds did not exist for believing that petitioner was disloyal to the United States and that, notwithstanding a single serious indiscretion in the handling of classified information, petitioner did not constitute a security risk to the Department of State (R. 28). This conclusion was approved by the Deputy Under Secretary of State (R. 42–43, 63).

After the issuance of Executive Order 10241, 16 Fed. Reg. 3690, on April 28, 1951, amending Executive Order 9835, the Loyalty Security Board of the Department of State again considered petitioner's case under the new loyalty standard set out in Executive Order 10241 and determined, on July 31, 1951, that no reasonable doubt existed as to his loyalty to

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by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority."

[2] Section 104, Public Law 179, authorized the Secretary of State, notwithstanding the provisions of any other law, in his "absolute discretion", to terminate the employment of any Foreign Service officer "whenever he shall deem such termination necessary or advisable in the interests of the United States."

the United States (R. 28). This decision was also approved by the Deputy Under Secretary of State (R. 42–43, 63). The Department of State referred this decision to the Loyalty Review Board of the Civil Service Commission for "post-audit" review.

On October 11, 1951, the Loyalty Review Board of the Civil Service Commission advised petitioner that, after review of the file, that Board had determined that the public interest required that it hold a new hearing which would be based upon the charges previously issued to petitioner by the Department of State Loyalty Security Board (R. 78–79). A hearing was held before a panel of the Loyalty Review Board attended by petitioner and his counsel at which petitioner and other witnesses testified.

Subsequent to this hearing, petitioner's attorney and the Chairman of the Loyalty Review Board entered into a stipulation to the effect that evidence had been taken at the hearing before the Loyalty Review Board on the issue as to whether petitioner had disclosed information of a confidential or non-public character within the meaning of subparagraph d of paragraph 2a of Part V, "Standards", of Executive Order 9835, as amended; that since the letter of charges given petitioner had not stated specifications as to the intentional or unauthorized disclosure by petitioner of information of a confidential or non-public character, in order to avoid returning the case to the Department of State for an amendment of the letter of charges, it was agreed that the Loyalty Review Board might make a determination as if the original

letter of charges had contained the following charge (R. 30-32):

> Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

On December 12, 1951, the Loyalty Review Board rendered its opinion (R. 1–12) that there was reasonable doubt as to petitioner's loyalty based on his intentional and unauthorized disclosure to Philip Jaffe, the editor of Amerasia magazine, of documents and information of a confidential and non-public character (R. 1–12).

On December 13, the Deputy Under Secretary of State informed petitioner that the Secretary of State had been advised of the decision of the Loyalty Review Board and that he had directed the termination of petitioner's employment in the Foreign Service "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress * * *" (R. 75–76).

Secretary Acheson, in making the determination to dismiss petitioner, acted in the exercise of his authority under both Executive Order 9835, as amended, and under Section 103 of Public Law 188. Although he made his determination solely as a result of his review of the opinion of the Loyalty Review Board—without independent review of the evidence or of the

Board's findings—he did not consider that he was legally bound or required by the opinion of the Loyalty Review Board to discharge petitioner. On the contrary, he considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to him and that he was legally free to exercise his own judgment as to whether petitioner's employment should be terminated, and he did exercise his own judgment (R. 81–83). The formal notice of termination issued to petitioner, dated December 17, 1951, cited as the authority for his termination Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress (R. 83–85).

Petitioner applied to the Civil Service Commission for relief and was informed by the Chairman of the Commission (R. 38–39) that the decision of the Loyalty Review Board was in the nature of a recommendation; that the Secretary of State had terminated petitioner's services pursuant to Executive Order 9835, as amended, and Section 103 of Public Law 188; and that the Civil Service Commission had no power to review the action of the Secretary of State, noting that the dismissal of petitioner was within the exclusive province of the Secretary of State (R. 38).

Petitioner then commenced this action in the District Court (R. 39–61) seeking, *inter alia*, a judgment declaring his discharge void and invalid; to obtain reinstatement to his employment with salary from the date of his discharge to the date of reinstatement; and for the expunging from the record of statements reflecting that his dismissal was on the ground that there was or is reasonable doubt as to his loyalty to

the United States (R. 59–61). On cross-motions for summary judgment, the District Court declared the action of the Loyalty Review Board to be a nullity and directed the Civil Service Commission to expunge from its records the Loyalty Review Board's finding that there is reasonable doubt as to petitioner's loyalty to the United States (R. 86, 90). The court then granted the respondents' motion for summary judgment, sustaining petitioner's dismissal from employment solely on the basis of Section 103 of Public Law 188, 82d Congress (R. 86–88, 90). On petitioner's appeal from this judgment, the Court of Appeals unanimously held that petitioner was validly discharged under Section 103 of Public Law 188, 82d Congress (Pet. App. 67–73) and affirmed the judgment of the District Court.

ARGUMENT

In accordance with this Court's decision and opinion in *Peters* v. *Hobby*, 349 U. S. 331, the District Court declared that the action of the Loyalty Review Board of the Civil Service Commission was a nullity (R. 85) and ordered the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). Petitioner's removal from the Foreign Service thus comes to rest solely upon the independent authority of Section 103 of Public Law 188, 82d Congress (App., *infra*, p. 16) which provides that:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555),

> or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

A removal from federal employment under this authority, as noted by the Court of Appeals (Pet. App. 73, n. 4), "carries no implication that [petitioner] might be either disloyal or a security risk."

Stripped, as it is, of all overtones of loyalty or security, petitioner's case is, in substance, identical to that of *Scher* v. *Weeks*, 231 F. 2d 494, (C. A. D. C.), certiorari denied, June 4, 1956, 351 U. S. 973. For reasons similar to those pertinent to the *Scher* case (No. 901, Oct. Term, 1955), the present petition should be denied.[3]

1. (*a*). At the time petitioner's employment was terminated, December 13, 1951, the procedural rights applicable to dismissals from government employment were conferred, generally, by three statutes: Section 6 of the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 652), Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1), and Section 14 of the Veterans' Preference Act (Act of June 27, 1944, 58 Stat. 390, as amended, 5 U. S. C.

[3] Public Law 188, 82d Congress, expired by its own terms in 1952. Though a provision identical to § 103 of Public Law 188 appeared as § 103 of Public Law 495, 82d Congress (66 Stat. 555), the provision was discontinued, without subsequent reenactment, with the State Department Appropriation Act of 1954.

863).[4] But Section 103 of Public Law 188, 82d Congress, under which petitioner was removed, expressly withdrew from employees the rights conferred by these statutes as well as the rights otherwise available to petitioner under the Foreign Service Act of 1946 (60 Stat. 1016, 22 U. S. C. 1007, 1008). In clear and unambiguous terms, Section 103 empowered the Secretary of State, during the then current fiscal year, to remove employees "[n]otwithstanding the provisions of [the Lloyd-LaFollette Act] or the provisions of any other law * * *." Emphasizing the breadth of this grant of authority, Section 103 further provided that the Secretary could exercise the power of dismissal "in his absolute discretion."

Petitioner challenges the validity of the Secretary's determination to dismiss him under this "absolute discretion" statute because he says the Secretary based his action entirely on the "illegal action" of the Loyalty Review Board (Pet. 14) in undertaking to review a favorable decision of the departmental Loyalty Security Board. Members of the Loyalty Review Board were men of outstanding ability, competence and integrity, and the Secretary undoubtedly had respect for their opinion. Inasmuch as the Secretary had absolute discretion to remove petitioner for any reason he saw fit, he certainly could have asked the members of the Board, in their private capacity, or any other person or group of persons in whom he had confidence, for their opinion and on the basis of that opinion he could have decided either to remove

[4] See also, Part II, Executive Order 9835 (Pet. App. 28-29).

petitioner or not to remove him. The fact that petitioner's removal, had it been effected solely under Executive Order 9835, would have been invalid has no effect whatsoever upon the separate and independent ground, under the "absolute discretion" statute, upon which the Secretary also acted.

Thus, the single limitation imposed by Section 103—and the sole procedural "right" which petitioner may claim—was that the Secretary "deem such termination necessary or advisable in the interests of the United States." And it is clear from the Secretary's affidavit (R. 81–83), as both courts below agreed (R. 87, Pet. App. 71–72), that this determination was made by the Secretary of State in petitioner's case. Since the sole procedural requisite to a discharge under Section 103 has been met, petitioner's discharge is valid and, being procedurally regular, is not subject to further review. *Scker* v. *Weeks,* 231 F. 2d 494 (C. A. D. C.), certiorari denied, 351 U. S. 973; *Williams* v. *Cravens,* 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290.

(*b*). Contradicting the "absolute discretion" with which the Secretary of State was vested by Section 103 of Public Law 188, petitioner contends that he could have been validly removed from the Foreign Service only upon compliance with State Department Regulations and Procedures (App. *infra,* pp. 19 *ff*) which are, in terms, applicable to loyalty and security

cases.[5] Without conceding that there was any deviation from the applicable regulatory procedures (see *infra*, pp. 13–14), we submit that petitioner's argument is without merit because it is based upon the incorrect assumption that petitioner, admittedly discharged under the authority of Public Law 188, was, in fact, discharged under that authority as a loyalty and security risk (Pet. 17).

From the outset, petitioner was fully informed that the Secretary of State was considering his case under two independent sources of authority: Executive Order 9835 (the loyalty order) and the "absolute discretion" statute (R. 28–30). And every *official* statement with respect to petitioner's termination denotes that the determination to remove him from the Foreign Service and the termination itself were made under both sources of authority (R. 38, 75–76, 81–85). Section 103, neither by its terms nor by implication, restricted the Secretary's summary removal authority to loyalty or security cases. Had the Secretary regarded petitioner's removal as necessary in the interest of national security, the appropriate authority for his removal would, of course, have been Section 1 of the Act of August 26, 1950 (5 U. S. C. 22–1, App. *infra*, pp. 16–18). Moreover, the Secre-

[5] The Regulations and Procedures of the State Department (App. *infra*, pp. 19*ff*.) were promulgated to conform to the procedural requirements of Executive Order 9835 (12 Fed. Reg. 1935), as amended by Executive Order 10241 (16 Fed. Reg. 3690)—which governed loyalty cases—and to conform to the procedural requirements specified in Section 1 of the Act of August 26, 1950 (5 U. S. C. 22–1) (App. *infra*, pp. 16–18), providing for the suspension and termination of employment "when deemed necessary in the interest of national security."

tary's affidavit does not state that, in exercising his summary removal authority under the "absolute discretion" statute, he dismissed petitioner either as disloyal or as a security risk (R. 81–83). And, as the Court of Appeals noted under a like statute in *Scher* v. *Weeks, supra,* and as it reiterated in this case, petitioner's removal under Section 103 of Public Law 188 "carries no implication that he might be either disloyal or a security risk" (Pet. App. 73).

Thus, as matters stand, petitioner's removal rests solely upon the Secretary's determination that, in his judgment, petitioner's removal was, in the words of the statute, "in the interests of the United States"—free of any implication of disloyalty or security. Accordingly, as the courts below have held, the procedural requirements of Executive Order 9835 and the Act of August 26, 1950, and the State Department Regulations pursuant thereto, had no application to petitioner's removal. And as petitioner himself recognizes (Pet. 18), the "absolute discretion" statute imposed no procedural requirements whatever for his dismissal (Pet. 18). "'Under Public Law 188 petitioner could have been summarily dismissed without notice of charges, hearing, or appeal'" (Pet. App. 72). See also *Scher* v. *Weeks,* 231 F. 2d 494 (C. A. D. C.), certiorari denied, 351 U. S. 973.

Petitioner attempts to bring his case within the rule of *Accardi* v. *Shaughnessy,* 347 U. S. 260, that where a department head prescribes by regulation a course of procedure not required by statute, he may not disregard that procedure in a particular case.

But as noted above (*supra*, pp. 10–11), the State Department Regulations and Procedures relied upon (App. *infra*, pp. 19*ff*.) are, in terms, applicable to dismissals on loyalty or security grounds, not to a dismissal in the exercise of authority under the "absolute discretion" statute.

2. Moreover, the procedures prescribed by the State Department Loyalty and Security Regulations were followed in petitioner's case, not because the procedures were applicable to the exercise of the Secretary's "absolute discretion" under Section 103, but because the regulatory procedure was applicable to the exercise of his authority under Executive Order 9835, under which he was concurrently proceeding in petitioner's case (R. 28–30, 75–76, 81–85). There was no departure from the Loyalty and Security Regulations in effect at the time of petitioner's dismissal.[6] The provision quoted by petitioner (Pet. 18), that the Secretary of State would, in the exercise of his "ab-

[6] Petitioner's contention to the contrary is based upon the Department of State's 1949 Regulations, which had been amended in May and September 1951, prior to petitioner's dismissal.

The Department of State Loyalty and Security Regulations were not published in the Federal Register because the statute establishing the Federal Register contemplates that regulations such as these dealing only with procedures applicable to Government employees shall not be published in the Register. Section 6 of the Act of July 26, 1935, 49 Stat. 500, 501, 44 U. S. C. 305. Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, excepts from the publication requirement any matter relating solely to the internal management of an agency. The 1951 regulations of the Department of State were distributed by the Department in accordance with normal distribution procedures, and copies were available to such employees as were affected or requested them.

solute discretion" authority, afford employees the same protection as provided under the Loyalty Program, was not in effect when petitioner was dismissed (Sec. 391.3, App. *infra*, p. 20). Likewise, the provision (Pet. 20) indicating that a favorable decision by the Department of State Loyalty Security Board would be reviewed only by an Assistant Secretary of State was modified, prior to petitioner's dismissal, to provide that such determination should be subject to post-audit by the Loyalty Review Board of the Civil Service Commission (Sec. 395.6, App. *infra*, pp. 37–38).

Finally, the provision of the regulations for appeal to the Secretary of State was, in both the 1949 and 1951 versions of the Regulations, for an appeal from an adverse decision by the Department of State Loyalty Security Board, not from an adverse decision by the Loyalty Review Board (Secs. 395.1, 396.1, Pet. App. pp. 41, 44; App. *infra*, pp. 32, 38). Since petitioner received favorable rulings from the Loyalty Security Board, there was, of course, no occasion for him to appeal those rulings to the Secretary of State.

3. The question presented, moreover, is no longer of general applicability. The statute under which petitioner was discharged, Section 103 of Public Law 188, 82d Congress, expired by its own terms in 1952. Though, as previously noted (*supra*, p. 8, n. 3), a provision identical to Section 103 of Public Law 188 appeared as Section 103 of Public Law 495, 82d Congress (66 Stat. 555), it expired in 1953, and the provision was discontinued, without subsequent re-enactment, with the State Department Appropriation Act of

1954. No case involving a like or similar statutory provision is currently pending in the lower courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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OCTOBER 1956.

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APPENDIX

Section 103 of Public Law 188 (the State Department Appropriation Act, 1952, 65 Stat. 575, 581), provides as follows:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1), provides as follows:

> Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the

Army, Department of the Navy; Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further,* That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22–1 to 22–3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this

purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further,* That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

The Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951, provide as follows:

390 LOYALTY AND SECURITY OF EMPLOYEES

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in

accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers

and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the

Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standard and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any

foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently belives in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed nec-

essary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be re-

quested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13 through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans' Preference Act of 1944; and for proposed removal on grounds relating to security shall be

Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board

cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days

subsequent to his receipt of the notice of charges, except as provided in section 22.2 (a) (2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in sections 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyalty Security Board to show why he

should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyalty Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyalty Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will *not* include all material in the file of the case, in that it will *not* include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the in-

terrogatory, if any, and the evidence taken at the hearing.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyalty Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be my majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been

handicapped in his defense by the non-disclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds *exist* for belief that the officer's or employee's

removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board

Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall *not* be a part of the written decision and shall in *no* instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Secu-

rity Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secre-

QUESTION PRESENTED

Section 103 of Public Law 188, 82d Congress, conferred upon the Secretary of State, in his absolute discretion and notwithstanding the provisions of any other law, the authority to terminate the employment of any officer of the Foreign Service. The question is whether, in the exercise of this statutory authority, petitioner was validly removed by the Secretary of State from the Foreign Service of the United States.

STATUTES AND REGULATIONS INVOLVED

Section 103 of Public Law 188, 82d Congress (The Department of State Appropriation Act, 1952, 65 Stat. 575, 581), is set forth in the Appendix, *infra*, p. 43. The Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951, are set forth in the Appendix, *infra*, pp. 43–66.

STATEMENT

Petitioner's employment as a Foreign Service Officer in the Foreign Service of the United States was terminated by the Secretary of State effective as of the close of business on December 14, 1951 (R. 75–76). His removal was effected under the authority of Section 103 of Public Law 188, 82d Congress (commonly known as the "McCarran Rider") and under Executive Order 9835, as amended by Executive Order 10241 (R. 82). The Loyalty Review Board of the Civil Service Commission had previously found that there was a reasonable doubt as to his loyalty to the Government of the United States (R. 35). The administrative action leading to petitioner's separation, and the judicial proceedings below, are as follows.

1. PETITIONER'S SEPARATION FROM GOVERNMENT EMPLOYMENT

On March 24, 1950, the Chairman of the Loyalty Security Board, Department of State, notified petitioner, an officer in the Foreign Service of the United States, that a hearing had been scheduled to consider charges against him with a view to making a recommendation to the Secretary of State as to whether or not petitioner's employment should be terminated in the interest of the United States (R. 28–30). The specific charges against petitioner, detailed in the letter of March 24, 1950, were as follows (R. 29):

> The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1,a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority.

The letter made reference to Section 104, Public Law 179, 81st Congress (The Department of State Appropriation Act, 1950, 63 Stat. 456), which, like

tary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable ground *do not exist* for belief that the officer's or employee's

removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds *exist* for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice

its successor, Section 103 of Public Law 188 (The State Department Appropriation Act, 1952, App. *infra* p. 43), gave to the Secretary of State the authority, in his absolute discretion, to terminate the employment of any Foreign Service officer of the United States whenever the Secretary "shall deem such termination necessary or advisable in the interests of the United States." The letter also referred to the procedures prescribed for administering the loyalty program under Executive Order 9835 (12 F. R. 1935) and petitioner was advised that it was his privilege to reply to the charges in writing and that a hearing would be held by the Loyalty Security Board on April 20, 1950, at which petitioner might appear and present evidence in his own behalf through witness or affidavit.

Following hearings attended by petitioner and his counsel, the Loyalty Security Board of the State Department, on October 6, 1950, concluded that reasonable grounds did not exist for believing that petitioner was disloyal to the United States. The Board took note of the fact that petitioner had committed two serious acts of indiscretion in that he had communicated classified information to Philip Jaffe, editor of the magazine *Amerasia*, without checking Jaffe's reputation and had allowed Jaffe to take possession of classified documents in violation of regulations (R. 24–25). Notwithstanding these "indiscretions", the Board concluded that petitioner did not constitute a security risk to the Department of State (R. 28). The findings and conclusions of the Loyalty Security

shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *exist* for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *do not exist* for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

U. S. GOVERNMENT PRINTING OFFICE: 1956

SUPREME COURT, U.S.
FILED
MAR 5
JOHN T. FEY, Clerk

No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1956

JOHN S. SERVICE, PETITIONER

v.

JOHN FOSTER DULLES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE, PETITIONER

v.

JOHN FOSTER DULLES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 85–88) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 92–98) is reported at 235 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals (R. 98) was entered on June 14, 1956. The petition for a writ of certiorari was filed on September 11, 1956, and was granted on November 13, 1956 (R. 99). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

Board were approved by the Deputy Under Secretary of State (R. 42-43, 63).

After the issuance of Executive Order 10241, amending Part V of Executive Order 9835, the Loyalty Security Board again considered petitioner's case under the new loyalty standard set out in Executive Order 10241 and determined, on July 31, 1951, that no reasonable doubt existed as to petitioner's loyalty to the United States (R. 28, 42, 63). This decision of the Loyalty Security Board was also approved by the Deputy Under Secretary of State (R. 42–43, 63).

Petitioner's case was then referred by the Department of State to the Loyalty Review Board of the Civil Service Commission,[1] established by Executive Order 9835, Part III. Acting pursuant to its Regulation 14[2] (R. 1) the Board, after review of peti-

[1] Annex 2 to Respondents' motion for summary judgment. Though a part of the record, the State Department's letter, transmitting petitioner's file to the Loyalty Review Board, is not included in the printed record.

[2] Regulation 14 (13 F. R. 255), as revised through December 17, 1948 (13 F. R. 9366), provided as follows:

"(a) The Board, or an Executive Committee of the Board shall, as deemed necessary from time to time, cause post audits to be made of the files on loyalty cases decided by the employing Department or Agency, or by a Regional Loyalty Board.

"(b) The Board, or an Executive Committee of the Board, shall have the right, in its discretion, to call up for review any determination or decision made by any Department or Agency Loyalty Board or Regional Loyalty Board, or by any head of an employing Department or Agency, even though no appeal has been taken. Any such review shall be made by a panel of the Board, and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision, or remand the case to the head of the Agency concerned for hearing, with appropriate instructions or for such further

tioner's entire file, recommended on October 9, 1951, that a hearing be held (R. 1). On October 11, 1951, the Board advised petitioner by registered mail that it had determined that the "public interest" required that a new hearing be held in his case "as provided for in * * * Regulation 14" (R. 78–79). The letter further advised petitioner that the hearing before the Board would be based on the charges "heretofore issued to you by the Department of State Loyalty Security Board and the issues to be heard at the hearing will be within the framework of those charges. The Loyalty Review Board will arrive at an independent judgment in this matter. The transcripts of all testimony taken below are a part of the co...plete file now before the Loyalty Review Board. However, you are invited to present any evidence you desire in your behalf at the hearing. You may present oral argument and you may, of course, be represented by counsel or other representative" (R. 79).

On November 8, 1951, a hearing was held before a panel of the Loyalty Review Board at which petitioner was present and testified and was represented by counsel (R. 1–2). Thereafter, petitioner's attorney and the Chairman of the Loyalty Review Board entered into a stipulation (R. 30–32) to the effect that evidence had been taken at the November 8 hearing on the issue as to whether petitioner had disclosed in-

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action or procedure as the panel may determine. In exceptional cases, if in the judgment of the Board or of an Executive Committee of the Board, public interest requires it, the panel may hold a new hearing in the case and after such hearing, affirm or reverse the determination or decision."

formation of a confidential or non-public character within the meaning of Part V of Executive Order 9835, as amended; and that, since the letter of charges given petitioner on March 24, 1950, had not stated specifications regarding the intentional and unauthorized disclosure of information of a confidential or non-public character, in order to avoid returning the case to the Department of State for an amendment to the letter of charges, it was agreed that the Board might consider the entire matter and make a determination thereon as if the original letter of charges contained the following specification under section 392.2d of the 1949 Regulations and Procedures of the Department of State (Pet. Br. 62) (R. 32):

> Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

The stipulation recited further as follows (R. 32):

> Provided, however, that the case before this Board shall be considered as if the Department of State Loyalty-Security Board had made a determination that no reasonable doubt of Service's loyalty exists when the facts are considered in relation to said section 392.2d and that the foregoing stipulation shall not be deemed to alter or affect in any way the significance properly attributable to the failure of the Department of State in fact to lay a charge of disloyalty under said section 392.2d and its de-

termination instead to lay a security risk charge under section 393.1a of its regulations.

On December 12, 1951, the Board rendered its opinion (R. 1–14). On the basis of petitioner's relations and dealings with Philip C. Jaffe, editor of *Amerasia*, and with others after his return from China on April 12, 1945, and until his arrest in connection with the *Amerasia* case on June 6, 1945 (R. 3–11), the Board concluded as follows (R. 14):

> We are not required to find Service guilty of disloyalty, and we do not do so, but for an experienced and trusted representative of our State Department to so far forget his duty to his trust as his conduct with Jaffe so clearly indicates, forces us with great regret to conclude that there is reasonable doubt as to his loyalty. The favorable finding of the Loyalty Security Board of the Department of State is accordingly reversed.

Petitioner's counsel was advised of the Board's decision on December 13, 1951 (R. 80). By letter of the same date (R. 33–35), the Chairman of the Loyalty Review Board advised the Secretary of State of the proceedings before the Board and of the Board's finding that there was a reasonable doubt as to petitioner's loyalty (R. 33–35). The Chairman's letter contained the following concluding paragraphs (R. 35):

> The Loyalty Review Board hereby submits to the Secretary of State its opinion: The employee, John Stewart Service, should be forthwith removed from the rolls of the Department of State; the Secretary should approve and

adopt the proceedings had, as heretofore recited herein; and such approval and adoption should appear on Standard Form 50, "Notification of Personnel Action."

Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service.

By letter dated December 13, 1951, petitioner was advised by the Deputy Under Secretary of State that the Secretary of State, under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress, had directed that petitioner's employment in the Foreign Service of the United States be terminated as of the close of business December 14, 1951 (R. 75–76). The official notifications of personnel action cite as authority for petitioner's termination "Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress" (R. 84–85). Thereafter, on December 27, 1951, in reply to petitioner's request for clarification of the reasons for termination of his employment, petitioner was advised by letter that his employment "was terminated solely as a result of the * * * finding of the Loyalty Review Board of the United States Civil Service Commission" (R. 76–77).

Petitioner subsequently applied to the Civil Service Commission for relief and was informed by the Chairman of the Commission (R. 38–39) that the decision of the Loyalty Review Board was in the nature of a recommendation; that the Secretary of State had terminated petitioner's services pursuant to Executive Order 9835, as amended, and Section 103 of Public

Law 188; and that the Civil Service Commission had no power to review the action of the Secretary of State, noting that the dismissal of petitioner was within the exclusive province of the Secretary of State (R. 38).

2. PROCEEDINGS BELOW

Petitioner's original complaint was filed in the district court on November 1, 1952. The third and last amended complaint (R. 40–61), filed on October 20, 1953,[3] challenged the validity of petitioner's separation on procedural and constitutional grounds and sought, by way of relief, (1) a declaratory judgment that his separation was invalid; (2) an order directing the Civil Service Commission and Loyalty Review Board to vacate the Board's letter of December 13, 1951 to the Secretary of State; (3) an order directing that State Department and Civil Service records be expunged of all written statements reflecting that petitioner's employment was terminated on the ground that there was a reasonable doubt as to petitioner's loyalty to the United States; (4) an order directing that petitioner be reinstated to his position in the Foreign Service with property rights and salary to the date of reinstatement; and (5) a public retraction of defamatory matter uttered and published in con-

[3] In addition to the Secretary of State, the complaint cited as defendants the Civil Service Commission and the Loyalty Review Board and the individual members of each (R. 39–40). The Loyalty Review Board ceased to exist on September 24, 1953 (Executive Order 10450 (18 F. R. 2489)). The action, therefore, abated as to the individuals formerly comprising the Board and as to them was dismissed by the district court (R. 85).

nection with his discharge from employment (R. 59–60).

Respondents answered the complaint (R. 62–67) and both petitioner (R. 70–71) and respondents (R. 80–81) moved for summary judgment. Respondents' motion was accompanied by the affidavit of Dean Acheson, Secretary of State, dated January 19, 1953, which states, in material part, as follows (R. 81–83):

> 1. I am the Secretary of State and have been such since January 21, 1949.
>
> 2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Service Commission submitting to me that Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.
>
> 3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.
>
> 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made

a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

Attached to Secretary Acheson's affidavit were State Department documents (R. 83–85) denoting the personnel action taken in petitioner's case which recite that the termination authority for petitioner's

separation were Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress (R. 84, 85).

While the motions for summary judgment were pending before the district court, this Court, on June 6, 1955, rendered its decision in *Peters* v. *Hobby*, 349 U. S. 331. On the authority of that decision, the district court declared the finding and opinion of the Loyalty Review Board to be a nullity (R. 88). However, since petitioner's removal rested not only upon Executive Order 9835, as amended, but also upon Section 103 of Public Law 188, 82d Congress, the district court sustained petitioner's separation as a valid exercise of the Secretary's "absolute discretion" under Public Law 188, 82d Congress (R. 88).

The order of the district court (R. 89–90) directed the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). In all other respects, the court granted respondents' motion for summary judgment and denied that of petitioner (R. 90).

On appeal, the Court of Appeals for the District of Columbia Circuit (R. 92–98) agreed that the finding and opinion of the Loyalty Review Board were invalid (R. 97–98) but, noting that petitioner's separation was based on the Secretary's authority conferred by Section 103 of Public Law 188, 82d Congress as well as Executive Order 9835, as amended, and that the Secretary had exercised his own discretion in terminating petitioner's employment, the court affirmed the order of the district court with the addi-

tional notation that petitioner's discharge under Section 103 "carried no implication that he might be either disloyal or a security risk" (R. 98).

SUMMARY OF ARGUMENT

I

Petitioner's employment was terminated by the Secretary of State "[a]cting in the exercise of the authority vested in [him] by Executive Order 9835 [relating to loyalty proceedings] * * * and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581) * * *" (R. 81–83). In accordance with this Court's opinion and decision in *Peters* v. *Hobby*, 349 U. S. 331, the district court has ordered the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). Petitioner's dismissal from the Foreign Service by the Secretary of State rested, however, not only on the supposed authority of Executive Order 9835, as amended, under which the Loyalty Review Board purported to act, but also upon Section 103 of Public Law 188, 82d Congress, which gave to the Secretary of State the authority, in his "absolute discretion" and notwithstanding the provisions of any other law, to dismiss any employee of the Department of State whenever such action was deemed "necessary or advisable in the interests of the United States." It is in this respect that petitioner's case critically differs from the *Peters* case, and it is upon this statutory authority that the courts below sustained petitioner's separation.

A. In dismissing petitioner from the Foreign Service, the Secretary of State specifically invoked the statutory authority of Section 103. That the Secretary, in exercising his "absolute discretion" under that statute, looked no further than to the finding and opinion of the Loyalty Review Board, affords no basis for invalidating petitioner's removal. Although the Board lacked jurisdiction and its opinion and finding alone could not sustain petitioner's dismissal, the record shows that the Secretary considered the Board's opinion and finding as "merely an advisory recommendation" (R. 83) and recognized that he was legally free to exercise his own judgment as to whether petitioner's employment should be terminated. Being under no misapprehension as to the effect of the Board's recommendation, and having used his own judgment, his decision to terminate petitioner's services is valid and must be sustained under the independent authority of Section 103 of Public Law 188, 82d Congress.

B. Assuming that a dismissal under Section 103 was subject to regulations promulgated by the State Department applicable to loyalty and security cases, petitioner received all the procedural protections those regulations afforded. However, petitioner's removal from Government service under the authority of Section 103 "in the interests of the United States", and not on loyalty or security grounds, was not subject to these regulations. Compliance with the regulations was necessary only where, unlike this case, dismissal was explicitly predicated upon loyalty or security grounds. As petitioner's removal was not

subject to any other statutory or regulatory limitation, there is no question in this case as to whether the Secretary of State was bound by his own regulations.

II

From the beginning of our constitutional history, appointment to and removal from federal office has always been regarded as a matter for executive discretion. In the absence of clear and express legislative limitations, the courts have held that challenges to appointments and dismissals present no justiciable issue. This doctrine has been based on the reluctance of the courts to interfere with the executive branch in the performance of its constitutional function, and on the view that, except as Congress may otherwise provide, Government employees hold office only at the pleasure of their superiors. Petitioner's dismissal, not subject to procedural limitation, thus represents an exercise of absolute discretion and, as such, the Secretary's decision to terminate petitioner's employment is not subject to judicial inquiry or revision.

ARGUMENT

I

THE SECRETARY OF STATE VALIDLY EXERCISED THE ABSOLUTE DISCRETION VESTED IN HIM BY SECTION 103 IN TERMINATING PETITIONER'S EMPLOYMENT

Petitioner's employment was terminated by the Secretary of State "[a]cting in the exercise of the authority vested in [him] by Executive Order 9835

[relating to loyalty proceedings] * * * and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581) * * * " (R. 81–83). In accordance with this Court's decision in *Peters* v. *Hobby*, 349 U. S. 331, the district court has ordered the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). Executive Order 9835 cannot therefore provide authority for petitioner's dismissal, and the only question now before this Court is whether the further and independent authority invoked by the Secretary of State—*i. e.*, Section 103—provided a basis for the valid exercise of executive discretion in terminating petitioner's employment.

Section 103 was reenacted[4] at a time when the Secretary of State already had authority to terminate employment when such action was either deemed necessary in the interest of "national security" (Section 1 of the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1) or there was a reasonable doubt as to the employee's loyalty (Executive Order 9835).[5] Clearly, therefore, Congress intended in Section 103 to confer upon the Secretary of State authority be-

[4] The "McCarran Rider," first appeared in the Department of State Appropriation Act, 1947, 60 Stat. 458. A like provision was contained in each succeeding appropriation act through the fiscal year 1953. 61 Stat. 288; 62 Stat. 315; 63 Stat. 456; 64 Stat. 768; 66 Stat. 555.

[5] Authority for removal of Foreign Service officers was also provided by the Foreign Service Act of 1946, 60 Stat. 1007, *et seq.*, 22 U. S. C. 826, *et seq.*. See fn. 9, *infra*, p. 22.

yond that already existing, and this intent is manifested in the language of the statute itself. Section 103 provides:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

The only basis for termination under section 103 was that the Secretary of State shall deem such action "necessary or advisable in the interests of the United States," and it is apparent that this determination was in fact made by Mr. Acheson, who specifically invoked this statute (R. 81–84).

We undertake first to show that this determination may not be upset merely because it was based upon a review by the Secretary of the opinion of the Loyalty Review Board—which opinion the Board concededly had no jurisdiction to render.[6] Next, assuming that the "absolute discretion" conferred by

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[6] In view of the conceded invalidity of the proceedings before the Loyalty Review Board of the Civil Service Commission, the constitutional issues posed and discussed by petitioner (Pet. Br. 2–3, 21–29), with respect to the Board proceedings, need not be resolved (*Peters* v. *Hobby*, 349 U. S. at 338) and are not, therefore, discussed in this brief. See, however, the Respondents' Briefs in *Bailey* v. *Richardson*, No. 49, Oct. T., 1950, pp. 56–99; *Peters* v. *Hobby*, No. 376, Oct. T., 1954, pp. 29–92. Proceedings which lead merely to a recommendation for executive action are, in any event, not subject to judicial review. Cf. *Chicago and S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103.

Congress in Section 103 is susceptible of procedural limitation by the Secretary of State (the courts below thought it was not (R. 88; 97)) and was in fact limited by departmental regulations applicable to petitioner's case, we show that there was full compliance with such regulations. However, we submit that the regulations by their terms do not impose procedural limitations on the exercise of the discretion vested in the Secretary of State by Section 103 to terminate employment "in the interests of the United States," invoked in his disposition of petitioner's case. Finally, in Point II we show that the appointment and removal of Government employees is a matter of executive discretion which is subject to judicial review only for compliance with applicable statutes or regulations, and since there has been such compliance here the validity of petitioner's dismissal is not a question which "the long tradition of our history has made appropriate for disposition by judges" (Frankfurter, *J.*, concurring in *American Communications Association* v. *Douds*, 339 U. S. 382, 416).

A. THE TERMINATION OF PETITIONER'S EMPLOYMENT BY THE SECRETARY OF STATE, IN THE EXERCISE OF HIS ABSOLUTE DISCRETION, IS UNAFFECTED BY THE LOYALTY REVIEW BOARD'S LACK OF JURISDICTION

Even if it be assumed, *arguendo*, and contrary to the authorities discussed in Point II (*infra*, pp. 35–41), that the reasons which motivated the exercise of the absolute discretion vested in the Secretary of State by Section 103 are a proper subject for judicial inquiry, the fact that the Secretary determined that petitioner's

dismissal was "necessary or advisable in the interests of the United States" as a result of his review of the opinion of the Loyalty Review Board (R. 82) affords no basis for invalidating that determination. In exercising his plenary authority under Section 103, the Secretary labored under no misapprehension as to the binding effect of the Loyalty Review Board's opinion.[7] Rather, he considered that opinion "merely an advisory recommendation" (R. 83) and recognized that he was "legally free" to exercise his *own* judgment as to whether or not petitioner's employment should be terminated (R. 83). Exercising his own judgment (R. 83), the Secretary made the "necessary determination" under Section 103 and decided to terminate petitioner's employment (R. 82–84). Although the Secretary looked no further than the opinion and finding of the Loyalty Review Board, the decision here is nonetheless his own and, as such, represents a valid exercise of his "absolute discretion", not "subject to revision in the courts." *Eberlein* v. *United States*, 257 U. S. 82, 84, discussed *infra* at pp. 40–41; *Jay* v. *Boyd*, 351 U. S. 345, 353–354."[8]

[7] Compare *Kutcher* v. *Gray*, 199 F. 2d 783 (C. A. D. C.), where the agency head acted in the erroneous belief that he was legally bound to follow the recommendation of the Board, and *Peters* v. *Hobby*, 349 U. S. 331, where the Board itself purported to debar Peters from federal service.

[8] Since petitioner's dismissal represents an exercise of the Secretary's "absolute discretion," *Perkins* v. *Elg*, 307 U. S. 325, is of no aid to petitioner. In that case, the Secretary's denial of a passport was based *solely* on a belief in the applicant's noncitizenship, a belief which this Court determined to be erroneous. The decision thus precluded the denial of the passport on noncitizenship grounds (*ibid.*, at 350). But beyond

Although it is not questioned that the Loyalty Review Board lacked jurisdiction to render the finding and opinion which formed the basis for the exercise of Mr. Acheson's discretion (R. 86), it does not follow that the findings of that Board were for all purposes a nullity. Because the Loyalty Review Board lacked jurisdiction, its findings could not, of their own force, alter the legal rights of petitioner and we have conceded, therefore, that, insofar as the termination of employment was predicated upon Executive Order No. 9835, it cannot be sustained. But the opinion and findings of the Loyalty Review Board nevertheless represent a *de facto* determination by highly qualified and impartial persons, and therefore provided a valid basis for the exercise of the absolute discretion vested in the Secretary of State. Cf. *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (orders of Civil Aeronautics Board, allegedly not based on substantial evidence, which had only the force of a recommendation to the President, held not subject to judicial review). The Secretary properly could have exercised his absolute discretion by basing his determination solely upon the views of private citizens, former Secretaries of State, senior Foreign Service officers, comments of members of Congress, or any other source which led him to believe that petitioner's action in lending Jaffé copies of his Foreign Service reports and giving him other

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that determination, the Court significantly did not purport to superintend the discretionary authority of the Secretary in the issuance or denial of a passport.

And because the Secretary of State in fact exercised his discretion in petitioner's case, *Accardi* v. *Shaughnessy*, 347 U. S. 260 and *Securities Comm'n* v. *Chenery*, 318 U. S. 80, are inapposite.

information which he had learned in the course of his official duties in China called for his removal "in the interests of the United States." Cf. *Hammond* v. *Hull*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777.

Petitioner's speculative assertion (Pet. Br. 30) that the Secretary would not have removed petitioner if he had known that the decision of the Loyalty Review Board was a "nullity" finds no support in the record. No such view is stated in the Secretary's affidavit, and petitioner, who had the burden of proving the facts necessary to support his action, did not avail himself of his opportunity in the district court to produce evidence to this effect.

B. PETITIONER'S REMOVAL UNDER SECTION 103 WAS NOT IN VIOLATION OF ANY STATUTORY OR REGULATORY RIGHT

1. *The statutory conditions otherwise applicable to employee removals were superseded by Section 103.*— At the time petitioner's employment was terminated, procedural rights applicable to removals from Government employment were conferred, generally, by three statutes: Section 6 of the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, as amended, 5 U. S. C. 652); Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1); and Section 14 of the Veterans Preference Act (Act of June 27, 1944, 58 Sfat. 390, as amended, 5 U. S. C. 863).[9]

[9] Foreign Service officers, being appointed by the President with the advice and consent of the Senate (Act of August 13, 1946, 60 Stat. 1007, 22 U. S. C. 906), are not in the classified Civil Service. Act of November 26, 1940, 54 Stat. 1211, as amended, 5 U. S. C. 631a. Nor are they entitled to the pro-

It is clear that none of these Acts provide a basis for invalidating petitioner's dismissal. For the explicit congressional purpose manifested in Section 103 was to vest in the Secretary absolute discretion, "notwithstanding the provisions * * * of any other law," to terminate summarily the employment of any Foreign Service officer so long as he deemed such termination "necessary or advisable in the interests of the United States." See *Scher* v. *Weeks*, 231 F. 2d 494 (C. A. D. C.), certiorari denied, 351 U. S. 973.

2. *Assuming their applicability, regulations promulgated by the Department of State with respect to employee-removal proceedings were complied with in petitioner's case.*—Petitioner contends that regulations of the Department of State promulgated in 1949 (App. Pet. Br. 61–73) apply to this case despite the fact that they were superseded in 1951 prior to the termination of petitioner's employment. It is further urged (Pet. Br. 37–38) that the 1949 regulations

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tection of the Veterans Preference Act. Section 20 of the Veterans Preference Act, *supra* (5 U. S. C. 869). Section 638 of the Foreign Service Act of 1946 (60 Stat. 1016, 22 U. S. C. 1008) provides that, before any Foreign Service officer may be separated by the Secretary of State for misconduct or malfeasance in office, he shall be granted a hearing before the Foreign Service Board and his misconduct or malfeasance must be established at that hearing. By Section 637 of that Act (60 Stat. 1016, 22 U. S. C. 1007), the Secretary may separate a Foreign Service officer for unsatisfactory performance of duty after a hearing before the Board, and the unsatisfactory performance of duty must be established at that hearing. To the extent that these sections of the Foreign Service Act might serve to restrict the Secretary's removal authority, they too were rendered inapplicable to the petitioner's case by reason of Section 103 of Public Law 188, 82d Congress.

were not complied with in petitioner's case, and that the termination of his employment was, therefore, invalid. We show (*infra*, pp. 28–35) that neither the 1949 nor the 1951 regulations apply to this case, but at this point in our argument we assume their applicability and show that under either set of regulations petitioner was validly dismissed from the Foreign Service under Section 103.

(*a*). *The 1949 regulations:* Petitioner first urges (Pet. Br. 37) that Section 395.6 of the 1949 regulations provided that a favorable decision of the Loyalty Security Board was to be reviewed by the Deputy Under Secretary and, if approved, the case was to be closed. The short answer to this contention is that the regulation contained no such provision, but merely provided that the employee be notified of the favorable decision. Nothing in Section 395.6 precluded further action by the Secretary of State under the independent authority of the "McCarran Rider."

Petitioner next contends (Pet. Br. 38) that he was denied an appeal to the Secretary of State, as allegedly provided for in Executive Order 9835 (Part II, Section 3) and in Sections 395.1 and 396.1 of the 1949 regulations (App. Pet. Br., pp. 67–70). This contention is without merit for the reason that those sections relate only to appeals to the Secretary of State or his designees from *adverse* decisions of the Loyalty Security Board of the Department of State. Petitioner received favorable decisions from that Board and was not therefore appealing from those decisions. The appeal which petitioner sought was from an adverse decision of the Loyalty Review

Board, and the regulations do not provide for such an appeal. Moreover, petitioner ultimately was removed because the Secretary of State determined that his employment should be terminated under Section 103 in the interests of the United States. Clearly, Sections 395.1 and 396.1 do not provide for an appeal *to* the Secretary of State from such a decision *of* the Secretary of State, and, of course, the regulations did not state that the only basis for dismissal by the Secretary of State would be an adverse finding as to loyalty or security.

With final reference to the 1949 regulations, petitioner urges (Pet. Br. 38) that Section 396.12 was violated by the proceedings herein. Section 396.12 provides that, upon the exercise of the right of appeal as permitted by Sections 395.1 and 396.1, a hearing will be held and that "[n]o witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned." But we have already shown, *supra*, p. 24, that the appeals provided for in Sections 395.1 and 396.1 were entirely inapplicable to petitioner's case. Petitioner abstracts from the above-quoted portion of Section 396.12 the words "contained in the record or submitted at that hearing," and urges that the statement in the Secretary's affidavit that he failed to read the testimony in petitioner's case, (R. 81–83) indicates a violation of this section. Petitioner thus reads this section as requiring that the Secretary personally review the entire proceedings in the case, but nothing

in Section 396.12, even if applicable to petitioner's case,[10] imposes such a requirement upon the Secretary. The requirement is merely that "new" evidence not be presented to the Secretary for the first time.

(*b*). *The 1951 regulations:* In urging that the 1951 regulations, if applicable, were also violated by the procedures followed in this case, petitioner relies upon Section 393.1 which provides:

> 393.1 *Security Standard*
>
> The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.[11]

But the only decision to which Section 393.1 relates is that the removal of the officer or employee involved is "necessary or advisable in the interest of national security." Nothing in this section purports to prescribe the procedure to be followed in determining that removal is "necessary or advisable in the interest of the United States," and it was this latter determination, made in the Secretary of State's absolute discretion, which led to petitioner's dismissal. In the

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[10] We show *infra* at p. 28 that the regulations had no application to the exercise of absolute discretion under Section 103.

[11] This last sentence also appears in § 392.1 with respect to loyalty cases where it has reference to the decision that reasonable grounds exist for belief that the employee is disloyal.

affidavit of the Secretary of State, he states that he did not read the testimony taken in the proceedings in this case, nor make an independent determination on the evidence submitted before the Boards as to whether there was reasonable doubt as to petitioner's loyalty. (R. 82.) But Mr. Acheson does *not* state that he arrived at the decision referred to in either Section 393.1 or 392.1 (R. 81–83), *i. e.*, that removal is necessary for reasons of security or loyalty. Moreover, in his affidavit, the Secretary of State explicitly stated that he considered the opinion of the Loyalty Review Board to be merely an advisory recommendation which left him free to exercise his own judgment and that he understood that the responsibility was vested in him to make the necessary determination under Section 103 (R. 82). This decision, that the termination of petitioner's employment was "necessary or advisable in the interests of the United States," the Secretary was free to make unfettered by any procedural limitations imposed by Section 393.1 or 392.1.[12]

Equally without merit is the asserted violation by the Secretary of State of Sections 396.11 and 396.12 of the Regulations. These sections (Appendix, *infra*, pp. 62–63, like their 1949 counterparts, see p. 24, *supra*, relate to appeals to the Secretary of State from

[12] That the authority to terminate employment conferred by the "McCarran Rider" was regarded by Mr. Acheson as being above and beyond that relating to loyalty and security dismissals is further indicated by his testimony contained in Hearings before the Subcommittee of the Senate Committee on Appropriations, Departments of State, Justice, Commerce and the Judiciary Appropriations for 1951, 81st Cong., 2d Sess., Pt. 1, p. 622.

adverse decisions of the Loyalty Security Board of the State Department. In view of the favorable decisions petitioner received from that Board, these sections are entirely inapposite and petitioner's contention without merit.

3. *Neither the 1949 nor the 1951 regulations applied to petitioner's dismissal.*—Petitioner concedes that Section 103 of Public Law 188 under which he was dismissed "itself required no procedural safeguards" (Pet. Br. 35). Yet petitioner contends, contrary to the holding of the courts below (R. 88; 97), that the regulations promulgated by the Department of State circumscribed the absolute discretion which Congress vested in the Secretary of State.

(*a*). It is clear from the language of Section 103, and the fact that it was enacted at a time when other authority existed to dismiss on loyalty and security grounds, that Congress intended to confer upon the Secretary of State a broader and unfettered discretion to terminate the employment of any officer or employee of the Foreign Service whenever such action was deemed necessary or advisable in the interest of the United States. Nothing in the language of Section 103 limited the exercise of this absolute discretion to cases involving persons whose loyalty or security was doubted. Subsequent to the enactment of Section 103, persons as to whom there was a reasonable doubt as to loyalty might be dismissed from Government service pursuant to Executive Order 9835, and when deemed necessary in the interest of national security, employment could be terminated under Section 1 of the Act of August 26, 1950, 64

Stat. 476, 5 U. S. C. 22–1. Section 103, therefore, clearly provided a third and independent basis for terminating Government employment. And in exercising the discretion to terminate employment "in the interests of the United States," as the courts below held (R. 88; 97), "[i]t was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under [the 'McCarran Rider']."[13] Thus, *Accardi* v. *Shaughnessy*, 347 U. S. 260, is inapposite, for

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[13] See remarks of Senator Ferguson speaking in opposition to a motion to strike the "McCarran Rider" from the 1951 Appropriations Act, 96 Cong. Rec. 11709. Senator Ferguson stated:

> I happened to be a member of the Appropriations Committee when the Senator from Nevada and other members of the committee had Mr. Byrnes, the then Secretary of State, before them, when this question was discussed initially and when this amendment was first placed in an appropriations bill. I am sure that if the Senate could have heard the former Justice of the Supreme Court they would understand that he, too, wants to protect all the rights of the citizens of the United States. But he also recognized and he spoke for something that was vital. He stated the fundamental proposition that employment by the United States Government is a privilege, and not an absolute right.
>
> Mr. Byrnes further recognized that if the head of a department such as the State Department or the Commerce Department were to protect the security of the United States in such a vital spot, vital to the people of America, *it would be necessary to give the Secretary of such department the right to discharge without trial. Without such authority it would be impossible for those department heads to operate their departments efficiently and for the safety and security of the United States.* [Emphasis added.]
>
> It was an established fact that without such authority it would have been impossible for the Secretary of State to have discharged Mr. Carl Marzani. That individual had had a trial before the Civil Service Commission, but as it developed he could not be discharged except by virtue of the McCarran rider. I hope the Senate will not undo the splendid work which was done by the senior Senator from Nevada when, in response to the representations of Sec-

there this Court, in holding that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner" (*supra*, at 267), was not dealing with a statute, the language and history of which reflect, as does the "McCarran Rider," a clear congressional purpose to permit the Secretary to act in his absolute discretion and without regard to any otherwise applicable departmental procedures.

Moreover, the regulations of the Department of State did not purport to circumscribe the exercise of the Secretary's absolute discretion to terminate employment in the interests of the United States. Both the 1949 and the 1951 Regulations of the Department of State explicitly relate to terminations based upon loyalty or security grounds and make no reference to other terminations deemed "necessary or advisable in the interests of the United States." For this further reason, therefore, these regulations were inapplicable to petitioner's dismissal and this case does not actu-

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retary Byrnes, he had this amendment included in the bill by the Appropriations Committee.

The Senate has affirmed it on various occasions, and the House likewise has seen fit to do so. In placing this provision in the bill the House showed its understanding of the Remington case. The House knew that William Remington was placed back in the Department of Commerce when there were the most serious questions against his loyalty. He has since been removed in the face of an indictment for perjury because he had stated he was not a Communist, but if the Secretary of Commerce had not had the authority for dismissal contained in this provision he would today be working in the Department of Commerce.

It is also clear that the ends to be served by the "McCarran Rider," *i.e.*, to operate departments "efficiently and for the safety and security of the United States," are broader in scope than the criteria of loyalty and security.

ally present the question urged by petitioner (Pet. Br. 44–47) whether the Secretary of State is bound by his own regulations. Cf. *Accardi* v. *Shaughnessy, supra.*

(*b*). The 1951 Regulations are the controlling regulations in determining whether the State Department regulations purported to prescribe procedures applicable to petitioner's case, for, at the time of petitioner's dismissal (December 14, 1951), the *Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State,* as adopted March 11, 1949 (App. Pet. Br. 61–73) had been superseded by regulations adopted May 4, 1951, and revised September 21, 1951 (Appendix, *infra*, pp. 43–66). The procedural regularity of petitioner's removal must, therefore, be measured, if at all, by the 1951 Regulations. To do so does not involve any "retroactive" application of those regulations. *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78; cf. *Carpenter* v. *Wabash Ry. Co.,* 309 U. S. 23, 26–27; *Vandenbark* v. *Owens-Illinois Co.,* 311 U. S. 538, 541–543; *Bruner* v. *United States,* 343 U. S. 112.

Petitioner, however, urges that the superseded 1949 regulations govern this case. This contention is based on the assertion that petitioner did not know of the 1951 regulations prior to this litigation (Pet. Br. 38) and the charge that those regulations were secret (Pet. Br. 43). These charges are wholly without support in the record. Neither the 1949 nor the 1951 Loyalty and Security Regulations of the Department of State were published in the Federal Register because the statute establishing the Federal Register

contemplates that agency regulations, such as these, dealing only with procedures applicable to Government employees, shall not be published in the Register. Section 6 of the Act of July 26, 1935, 49 Stat. 501, 44 U. S. C. 305. And Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, similarly excepts from the publication requirement any matter relating solely to the internal management of an agency. The 1951 regulations of the Department of State were distributed by the Department in accordance with normal distribution procedures, and copies were available to any employee upon request. Of course, it was the 1949 regulations which were forwarded to petitioner along with the initial letter of charges on March 24, 1950, since those regulations were then in effect (R. 29), but such action did not preclude the Department of State from later amending its regulations.[14]

(c). Petitioner's desire to have the 1949 regulations govern his case is, in any event, a fruitless one. He seeks to support his contention that departmental regulations limited the exercise of "McCarran Rider" discretion by pointing to Section 391.3 of the 1949 regulations, which provided that:

* * * * *

> In addition, the Secretary of State has been granted by Congress the right, in his absolute

[14] The stipulation entered into by petitioner's attorney and the chairman of the Loyalty Review Board added additional charges based upon the 1949 regulations, but this stipulation was an amendment to the letter sent on March 24, 1950 (R. 28), and does not, in any event, establish that the 1949 regulations were to govern the ultimate disposition of this case.

> discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

But this provision, in context, is at most a statement of departmental policy which goes no farther than to say that "so far as possible" certain procedures would be followed under the substantive authority of the "McCarran Rider" with respect to loyalty and security cases. The very title of the regulations ("*Regulations and Procedures Relating to Loyalty and Security of Employees, U. S. Department of State*," App. Pet. Br. 61) indicates that their scope was limited to such cases and nothing contained in those regulations supports the proposition that they were intended to prescribe procedural limitations for other terminations deemed "necessary or advisable in the interests of the United States."[15] Sections 395.1

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[15] The 1949 regulations, of course, antedated the Act of August 26, 1950, 5 U. S. C. 22-1, providing for the summary suspension and, after specified procedural steps, termination of employment where deemed "necessary or advisable in the interest of the national security of the United States * * *." See *Cole* v. *Young*, 351 U. S. 536.

[16] The State Department report to the Tydings Committee (S. Rep. 2108, 81st Cong., 2d Sess., pp. 14-17; Pet. Br. 37-38) was based on the 1949 regulations and was directed solely to the question of loyalty and security dismissals. President Truman's letter of September 6, 1950, with respect to the "McCarran Rider" effective during the fiscal year 1951 (R.

and 396.1 of the 1949 regulations, on which petitioner particularly relies (Pet. Br. 38), in turn make it clear that they relate only to determinations with respect to loyalty or security risks, not to dismissals "necessary or advisable in the interests of the United States."

The 1951 regulations which, we submit, were the only regulations possibly applicable here, made reference to the "McCarran Rider" authority of the Secretary of State only with respect to security cases (Section 391.3, App. *infra*, p. 44) and, like the 1949 regulations, did not purport to limit the exercise of discretion in determining whether termination was necessary or advisable in the interests of the United States. Moreover, the opinion of the Loyalty Review Board, on the basis of which the Secretary of State exercised his absolute discretion, dealt solely with the finding that there was a reasonable doubt as to petitioner's loyalty and made no finding with respect to security.[17]

90–91) is likewise of no avail to petitioner. The letter reflects the President's concern for the procedural rights of employees in cases involving the "national security" and manifests the President's "desire" that in exercising his discretionary removal power in such cases the Secretary of State follow the procedures outlined in Public Law 733 (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1). The letter cannot be construed to create procedural rights in an employee. If, in petitioner's case, the Secretary acted in disregard of the President's desires—and we think he did not—the Secretary may have been accountable to the President but not to petitioner. *Matter of Heaven*, 13 Pet. 230, 261.

[17] Had petitioner's removal rested upon security grounds, undoubtedly Secretary Acheson would have cited the Act of August 26, 1950 (5 U. S. C. 22–1), *supra*, p. 33, fn. 15, as an authority for his dismissal.

The regulations which referred to the "McCarran Rider" solely with respect to security cases are, for that further reason, inapplicable.

It is clear, therefore, that in exercising his absolute discretion to terminate petitioner's employment, the Secretary of State violated no rights conferred upon petitioner by any applicable statute or departmental regulations. Accordingly, as we show in the following point, the validity of the termination of petitioner's employment is the type of question which this Court has traditionally refrained from reviewing.

II

THE APPOINTMENT AND REMOVAL OF GOVERNMENT EMPLOYEES IS A MATTER OF EXECUTIVE DISCRETION WHICH IS SUBJECT TO JUDICIAL REVIEW ONLY FOR COMPLIANCE WITH APPLICABLE STATUTES OR REGULATIONS

From the beginning of our constitutional history, it has been settled that questions of tenure of office are basically not judicial questions, except as Congress may impose statutory requirements which become judicially enforceable. Responsibility for the quality of Government officers and employees is vested by the Constitution in the executive and legislative branches. Art. II, Secs. 2, 3. In particular, it has long been settled that the President has a discretionary power of removal, derived from the nature of his executive office, which is unrestricted except as Congress, in the exercise of its power to provide for the appointment of inferior federal officers (Constitution, Art. II, Sec. 2), may validly limit it by

general legislation. *Myers* v. *United States*, 272 U. S. 52.

In the absence of legislative restraint upon the executive's discretionary power to remove inferior Government officers and employees, the courts have consistently refused to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that there has been compliance with the mandate of Congress. At no time have the courts intervened to review the basis for executive action (cf. *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103) or to substitute their judgment for that of the officials. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United States*, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Pet. 230; *United States* v. *Guthrie*, 17 How. 284.[18]

Judicial non-intervention in the field of personnel administration is, of course, merely one application

[18] See also, *A. Lincoln Green* v. *Baughman*, No. 13,500 (C. A. D. C.), decided January 31, 1957; *Ellmore* v. *Brucker*, 236 F. 2d 734, 736–737 (C. A. D. C.), certiorari denied, December 17, 1956; *Smith* v. *Dulles*, 236 F. 2d 739, 742 (C. A. D. C.), certiorari denied, December 17, 1956; *Keyton* v. *Anderson*, 229 F. 2d 519 (C. A. D. C.); *Boylan* v. *Quarles*, 235 F. 2d 834 (C. A. D. C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.); *Kohlberg* v. *Gray*, 207 F. 2d 35 (C. A. D. C.), certiorari denied, 346 U. S. 937; *Blackman* v. *Lee*, 205 F. 2d 13 (C. A. D. C.); *Terry* v. *Stevens*, 203 F. 2d 219 (C. A. D. C.); *Watson* v. *Pace*, 201 F. 2d 713 (C. A. D. C.), affirming 101

of the long-recognized principle that "the interference of the courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and * * * that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516.[19] The constitutional responsibility of the executive and legislative branches of the Government in matters of personnel administration of necessity comprehends, as a corollary of the appointive authority, the power of removal. And no function is more clearly internal to the executive branch than the selec-

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F. Supp. 477 (D. D. C.); *Kirkpatrick* v. *Gray*, 198 F. 2d. 533 (C. A. D. C.), certiorari denied, *sub nom. Priestly* v. *Donaldson*, 344 U. S. 880; *Powell* v. *Brannan*, 196 F. 2d 871 (C. A. D. C.); *Devine* v. *Campbell*, 194 F. 2d 876 (C. A. D. C.), certiorari denied, 344 U. S. 826, *Ciaffone* v. *United States*, 126 C. Cls. 532; *McNulty* v. *United States*, 126 C. Cls. 573; *Engelhardt* v. *United States*, 125 C. Cls. 603; *Palmer* v. *United States*, 121 C. Cls. 415; *Blum* v. *United States*, 120 C. Cls. 232; *Love* v. *United States*, 119 C. Cls. 486, certiorari denied, 342 U. S. 866; *Croghan* v. *United States*, 116 C. Cls. 577; *Dupre* v. *United States*, 116 C. Cls. 660.

[19] See also *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U. S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Ness* v. *Fisher*, 223 U. S. 683, 691-692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *United States*, 281 U. S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Adams* v. *Nagle*, 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131-132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

tion and retention or dismissal of its employees.[20] As the court below succinctly observed in *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918, "the judiciary cannot assume responsibility for the sufficiency of the qualifications of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power." (182 F. 2d at 62.)

The inappropriateness of judicial inquiry into the ground of removal of a public officer or employee is further manifested by the nature of public office. It has been held repeatedly that the appointment to and the tenure in public office are not contract or property rights. *Taylor and Marshall* v. *Beckham*, 178 U. S. 548; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Butler* v. *Pennsylvania*, 10 How. 402; see 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 746, n. 1. Therefore, if office is held at the discretion of the appointing authority, "this

[20] "The framers of our Constitution had one essential feature of efficient government clearly in mind. They gave to the Executive officer charged in law with the responsibility and actually charged by the people with the responsibility of carrying on the Executive department of the government, the power and means of meeting that responsibility. They vested in him complete power to appoint all the officers of the government who were subordinate to him, and upon whose political capacity and governmental discretion would depend the wise carrying out of his policies. They gave him the power of absolute removal, and they placed in his hands the control of the action of all those who took part in the discharge of the political duties of the executive department. They acted on a sound political principle * * *." Taft, *Our Chief Magistrate and His Powers* (1916), p. 76.

court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. 'If the [appointing authority] is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; * * *.'" *Matter of Hennen*, 13 Pet. 230, 261.

Although the advent of Civil Service laws and regulations have, to some extent, limited executive discretion over removal, judicial abstention from interference with those acts within the scope of executive discretion has been uniformly affirmed. Thus, the courts have intervened to enforce compliance with specific procedural steps required by law and regulations. *United States* v. *Wickersham*, 201 U. S. 390; *Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.); *Manning* v. *Stevens*, 208 F. 2d 827 (C. A. D. C.); *Money* v. *Anderson*, 208 F. 2d 34 (C. A. D. C.); *Kutcher* v. *Gray*, 199 F. 2d 783 (C. A. D. C.); *Deak* v. *Pace*, 185 F. 2d 997 (C. A. D. C.); *Borak* v. *Biddle*, 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Stringer* v. *United States*, 117 C. Cls. 30; *Wittner* v. *United States*, 110 C. Cls. 231; *Elchibegoff* v. *United States*, 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694. Where, however, appropriate procedural steps have been taken, judicial inquiry into the basis for or propriety of removal has been consistently refused. See cases cited *supra*, pp. 36–37.

Thus, in *Keim* v. *United States*, 177 U. S. 290, where an employee had been discharged as inefficient, this

Court refused to consider the contention that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship," stating (p. 296):

> These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

And even where it is conceded that executive discretion was erroneously exercised, this Court has held that the executive action could not be judicially revised. *Eberlein* v. *United States*, 257 U. S. 82; cf. *Ginn* v. *United States*, 110 C. Cls. 637; *Kellom* v. *United States*, 55 C. Cls. 174. In the *Eberlein* case, plaintiff was removed from office, in accordance with the procedure then in force, on the ground that he had accepted bribes and defrauded the Government. Two years later, the Attorney General reinvestigated plaintiff's record and reported that in his judgment the charges were not sustained. Pursuant to a still further investigation, the President, by Executive Order, restored plaintiff to eligibility for appointment, and plaintiff was subsequently reinstated. Affirming the judgment of the Court of Claims denying

plaintiff recovery of the salary of the office from the date of his removal to the date of his reinstatement, this Court declared (257 U. S. at 84):

> But the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts.[21]

If this Court in *Eberlein*, refrained from reviewing executive discretion concededly erroneously exercised, we respectfully submit that *a fortiori* it should not review the exercise of that discretion here, where the discretion conferred to terminate employment "in the interests of the United States" was "absolute," and one cannot say it was erroneously exercised.

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[21] *Peters* v. *Hobby*, 349 U. S. 331, and *Cole* v. *Young*, 351 U. S. 536, do not represent a departure from the traditional limited scope of judicial inquiry in employee removal cases but are wholly consistent therewith. The invalidation of the removal in *Peters*, *supra*, was based upon the illegality of the Loyalty Review Board's action which, exclusively, underlay Peters' removal. In *Cole* v. *Young*, *supra*, the removal, purportedly effected under the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22-1, was held invalid because of the inapplicability of that Act and because of administrative noncompliance with the procedural requisites of Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U. S. C. 863.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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MARCH, 1957.

APPENDIX

1. Section 103 of Public Law 188 (The State Department Appropriation Act, 1952, 65 Stat. 575, 581), provides as follows:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

2. The Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951, provide as follows:

390 LOYALTY AND SECURITY OF EMPLOYEES

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal

or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State

(including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved in disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons,

designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standard and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the

authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of

a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian,

Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take

action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional infofmation required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13

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through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, seting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to

the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the Board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the Board shall furnish the officer or employee a notice of the time and place when the Board proposes to consider his case, in order that he, together with his counsel or representa-

tive, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the Board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you shall take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2 (a) (2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in sections 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyalty Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an

administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31. The hearings shall be before a panel of the Loyalty Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyalty Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to

present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will *not* include all material in the file of the case, in that it will *not* include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the hearing.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyalty Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as

possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the

officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall *not* be a part of the written decision and shall in *no* instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Govern-

ment. In such exceptional circumstances, the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board re-

quires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable ground *do not exist* for belief that the officer's or employee's removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds *exist* for belief that the

officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the loyalty determination is concerned, the officer or ployee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *exist* for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *do not exist* for belief that

the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

U. S. GOVERNMENT PRINTING OFFICE: 1951